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The parties have agreed that the following portions of the Record be printed as the single Appendix herein.

THE TRANSCRIPT OF RECORD
(Supreme Court of South Carolina)

The State of South Carolina
IN THE SUPREME COURT

IN THE COURT OF COMMON PLEAS
FOR CHARLESTON COUNTY

THE HONORABLE CLARENCE E. SINGLETARY, RESIDENT JUDGE

RICHARD W. HUNT, INDIVIDUALLY AND REPRESENTING ALL OF THE TAXPAYERS OF THE STATE OF SOUTH CAROLINA, PLAINTIFF-APPELLANT,

v.

ROBERT E. McNAIR, GOVERNOR OF THE STATE OF SOUTH CAROLINA, GRADY L. PATTERSON, JR., TREASURER OF THE STATE OF SOUTH CAROLINA, JOHN H. MILLS, COMPTROLLER GENERAL OF THE STATE OF SOUTH CAROLINA, EDGAR A. BROWN, CHAIRMAN OF THE SENATE FINANCE COMMITTEE, ROBERT J. AYCOCK, CHAIRMAN OF THE WAYS AND MEANS COMMITTEE OF THE HOUSE OF REPRESENTATIVES, CONSTITUTING THE BUDGET AND CONTROL BOARD OF THE STATE OF SOUTH CAROLINA; DANIEL R. McLEOD, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, AND BAPTIST COLLEGE AT CHARLESTON, AN ELEEMOSYNARY SOUTH CAROLINA CORPORATION, DEFENDANTS-RESPONDENTS.

STATEMENT OF FACTS

This action was instituted in the Charleston County Court of Common Pleas wherein the Plaintiff filed his Complaint on March 20th, 1970 for the purpose of (a) con-

testing the constitutionality of the Educational Facilities Authority Act (Section 25 of Act No. 349 of the Acts of the South Carolina General Assembly for the year 1969); and (b) in the event the Act should be held constitutional, prohibiting its use for the benefit of the Defendant Baptist College at Charleston and any other institution of higher learning in whole or in part under the direction or control of any church or church related organization. The Plaintiff is a taxpayer of the State of South Carolina and a resident of Charleston County and the Defendants include the members of the Budget and Control Board of the State of South Carolina, the Attorney General of the State of South Carolina and Baptist College at Charleston, an eleemosynary South Carolina corporation. Under the provisions of the Educational Facilities Authority Act (the Act) the Budget and Control Board of the State of South Carolina acts as the Educational Facilities Authority (the Authority) with the function of issuing revenue bonds pursuant to the Act for the benefit of participating institutions of higher learning.

Plaintiff sought and obtained an Order for the publication of a Notice of the institution of the action and affording any interested party an opportunity to intervene and raise additional objections. The Notice was duly published in the Columbia, South Carolina "The State" and in the Charleston, South Carolina "The News & Courier" on Wednesday, March 25th, 1970 and although more than twenty days have elapsed no person has sought to intervene, and an affidavit and order of default have been duly filed. Furthermore, the Defendant Baptist College at Charleston notified other private colleges in the State of the institution of this action and received from them numerous letters of support favoring the Act and its use in this instance.

The Baptist College at Charleston operates a four year college in Charleston County, South Carolina. The College has applied to the Authority for the issuance of revenue bonds pursuant to the Act in the amount of not exceeding $3,500,000.00 for the purpose of (a) paying off certain outstanding indebtedness of the Baptist College

Foundation incurred for the purpose of acquiring equipment and trailers utilized as a part of the College's educational plant and for the payment of which the College is responsible; (b) reimbursing in part the College's Current Fund for moneys advanced to the College's Plant Fund and used to purchase school equipment and other capital improvements and for partial payment of the aforesaid obligation of the Baptist College Foundation, and (c) refunding an outstanding indebtedness of the College in the amount of approximately $2,500,000.00 represented by the College's First Mortgage Serial Bonds dated July 1, 1966, the proceeds of which were used to construct buildings on the College campus, to purchase equipment and for land improvements.

In accordance with the provisions of the Act the College proposes to convey substantially all of its campus to the State of South Carolina at no cost to the State. The Authority will then lease the property so conveyed back to the College under a Lease Agreement by which the College will be obligated to operate and maintain it as an institution of higher learning and to pay to the Authority rentals in an amount sufficient to meet the payments of principal and interest as they become due on the proposed revenue bonds. The Authority issues the revenue bonds and make the proceeds available for the purposes aforesaid and the bonds would be repayable solely from the rentals to be paid by the Baptist College under the Lease Agreement and would be further secured by a Trust Indenture between the Authority and a Bank which would constitute a forecloseable lien on the property conveyed to the State.

Excluded from the property to be conveyed by the College to the State is the library which is being financed in part by a loan from the Department of Health, Education and Welfare; dormitory, which is being financed in part by a loan from the Department of Housing and Urban Development; a dormitory which is currently under lease to the College and the Physical Educational Building wherein are located facilities which are used for religious worship. Excluded also are approximately 50 acres of land forming a part of the College campus.

The College has sought the issuance of the bonds aforesaid and to that end filed a Petition dated January 6th, 1970 with the Authority. Thereafter, at its meeting on January 16th, 1970 the Authority adopted a Resolution giving preliminary approval to the financing arrangements outlined in the College's Petition.

The Plaintiff in this action seeks to enjoin any further action by the Defendants pursuant to the Act. He alleges that the Act is unconstitutional in that it is a State undertaking to finance private educational facilities, which is not a public purpose: that it violates Article X, Section 6 of the South Carolina Constitution which prohibits any pledge or loan of the State's credit for the benefit of any individual company, association or corporation; that the proposed actions of the Authority would deprive the Plaintiff of property without due process of law in violation of the provisions of Section 5 of Article I of the South Carolina Constitution; that the proposed actions of the Authority violate the equal protection clauses of the State and Federal Constitutions inasmuch as they would result in certain benefits to be afforded to "institutions of higher learning" as defined in the Act, exclusively, and the option granted to the College under the proposed Lease Agreement whereby the College upon payment of the bonds will reacquire the property conveyed to the State for the nominal sum of $1.00 violates the public policy of the State and Section 31 of Article III and Section 5 of Article I of the South Carolina Constitution inasmuch as it would constitute a donation of State property.

In the event the Act and the proposed actions of the Authority pursuant thereto do not violate any of the above-mentioned constitutional provisions the Plaintiff further contends that in any event the proposed action here for the benefit of the Baptist College at Charleston would violate Article XI, Section 9 of the South Carolina Constitution which forbids any State assistance to a College which is wholly or in part under the direction or control of any Church or of any religious or sectarian denomination, and would violate the First Amendment to the United States Constitution and Article I, Section 4 of the South

Carolina Constitution which prohibits the making of any law respecting an establishment of religion or prohibiting the free exercse thereof.

The Defendants have all filed Answers generally contending that the Act is constitutional and that proposed actions of the Authority for the benefit of the Baptist College at Charleston violate no constitutional provisions. There are no material issues of fact and the matter was heard on its merits before The Honorable Clarence E. Singletary, in his Chambers, at the Charleston County Courthouse, on Friday, April 24th, 1970, at which time were present Counsel for all the parties. After hearing arguments of Counsel and on the basis of the pleadings Judge Singletary handed down his Decree dated May 1st, 1970 wherein he sustained the Act and likewise sustained the proposed actions of the Authority thereunder for the benefit of the Baptist College at Charleston. Within due time the Plaintiff filed Notice of Appeal to the South Carolina Supreme Court.

COMPLAINT

(omitting caption and verification)

The Plaintiff above named, complaining of the Defendants above named, alleges:

1. The Plaintiff is a taxpayer of South Carolina and a resident of Charleston County, whose interests would be adversely affected by the action which the Defendants who constitute the Budget and Control Board of South Carolina (the State Board) propose to take pursuant to the Act hereinafter referred to and as such brings this action on behalf of himself and on behalf of all taxpayers of South Carolina.

2. The Plaintiff brings this action pursuant to the Uniform Declaratory Judgments Act (Sections 10-200, *et seq.*, Code of Laws of South Carolina, 1962).

3. The Defendants, Robert E. McNair, Governor of the State of South Carolina, Grady L. Patterson, Jr. Treasurer of the State of South Carolina, John H. Mills, Comptroller General of the State of South Carolina, Edgar A. Brown, Chairman of the Senate Finance Committee, Robert

J. Aycock, Chairman of the Ways and Means Committee, together constitute the State Board which has offices in the City of Columbia, in Richland County, South Carolina and acts as the Educational Facilities Authority (the Authority) under the Act hereinafter referred to.

4. The Defendant, Baptist College at Charleston (the College) is an eleemosynary educational corporation organized under the laws of the State of South Caorlina, and a copy of its Charter is attached hereto as Exhibit "A".

5. The Defendant, Daniel R. McLeod, is made a party in his capacity as Attorney General of the State of South Carolina pursuant to Section 10-2008, Code of Laws of South Carolina, 1962, inasmuch as this action seeks to declare the Educational Facilities Authority Act hereinafter referred to unconstitutional, null and void.

6. At its 1969 Session, the South Carolina General Assembly enacted the Educational Facilities Authority Act which appears as Section 25 of Act No. 349 of 1969 which became effective June 24th, 1969, and is hereinbefore and hereinafter referred to as the Act.

7. Under the provisions of the Act, the State Board acting as the Authority is authorized to provide financing for institutions of higher learning as defined in the Act by the issuance of revenue bonds payable solely out of the revenues of the Authority derived from the particular project for which they are issued, and secured by a mortgage on the project so financed. The Act further provides that revenue bonds may be issued to refund outstanding obligations issued by an institution of higher learning for the cost of a project as defined in the Act.

8. The College owns an educational plant which includes administration buildings, classroom buildings, a library, a physical education building and dormitories on a tract of land located in Charleston County which it operates as a four year institution of higher learning.

9. On information and belief, the Defendant College has heretofore presented a Petition to the State Board acting as the Authority dated January 6, 1970, wherein the College seeks the preliminary approval of the State Board acting as the Authority for the issuance of not

exceeding $3,500,000 of revenue bonds pursuant to the Act for the following purposes:

(a) To pay off outstanding indebtedness of the Baptist College Foundation incurred for the purpose of acquiring certain equipment and trailers utilized as a part of the College's educational plant (and for the payment of which the College is responsible) in the amount of approximately $275,000.

(b) In order to reimburse in part the College's Current Fund for moneys advanced to the College's Plant Fund and used to purchase school equipment and other capital improvements and for payment of the obligation of the Baptist College Foundation hereinbefore mentioned; and

(c) To refund an outstanding indebtedness of the College in the amount of approximately $2,500,000 represented by the College's first mortgage serial bonds dated July 1, 1966.

10. The Petition of the College aforesaid to the State Board acting as the Authority proposes that the College convey approximately 400 acres of land with the facilities located thereon to the Authority which shall then lease the said land and facilities back to the College at a rental which will be sufficient to meet the principal and interest as they become due on the proposed bonds. Such lease will further provide that the College upon payment of the bonds will re-acquire the land and facilities at no cost to the College.

11. A copy of the said Petition (without exhibits) is attached hereto as Exhibit "B".

12. On information and belief, the State Board acting as the authority at its meeting held January 16th, 1970, adopted a resolution as follows:

RESOLUTION

BE IT RESOLVED by the State Budget and Control Board of South Carolina acting as the Educational Facilities Authority pursuant to the Educational Facilities Authority Act (Section 25 of Act No. 349 of the 1969 Acts of the South Carolina General Assembly) that the Petition of the Baptist College at Charleston dated January 6th, 1970, to the Educational Facilities Authority seeking preliminary approval of the financing arrangement outlined in said Petition whereby the Authority would issue not exceeding $3,500,000 Revenue Bonds pursuant to the Educational Facilities Act be and the same is hereby granted, subject to the approval by the Authority of the final terms and conditions of the proposed financing and of the terms and provisions of the Lease Agreement and Trust Indenture to be used in connection therewith.

13. The Plaintiff is informed and believes that the proposed financing is for the benefit of a private eleemosynary corporation and that the State would receive no benefit therefrom, particularly in view of the fact that the proposed revenue bonds would refund outstanding indebtedness and, therefore, would not provide any additional educational facilities and that, therefore, the proposed financing would serve no public purpose.

14. The Plaintiff is informed and believes that the four year institution of higher learning owned and operated by the College is a church supported and controlled institution managed by a Board of Trustees elected by the South Carolina Baptist Convention "in trust for the South Carolina Baptist Convention" as more fully set forth in the College's Charter.

15. The Plaintiff is informed and believes that the Educational Facilities Authority Act is unconstitutional, null and void for the following reasons:

(a) The undertakings by the State to finance private educational facilities is not a public purpose for which the State may issue bonds;

(b) The Act purports to authorize and lend the credit of the State of South Carolina for the benefit of a private corporation in violation of Section 6, of Article X of the South Carolina Constitution;

(c) The proposed acts of the State Board pursuant to the Act would deprive the Plaintiff of property without due process of law in violation of the provisions of Section 5 of Article I of the South Carolina Constitution inasmuch as the State Board would expend public funds for the benefit of a private corporation;

(d) The Act and the proposed actions of the State Board violate the equal protection clauses of the State and Federal Constitutions inasmuch as certain privileges and immunities are afforded to "participating institutions for higher education" as defined in the Act which are not avaliable to all classes of persons generally nor available to all classes of persons in the field of education generally;

(e) The option proposed to be granted to the College to purchase land and facilities at a nominal value violates the public policy of the State of South Carolina in violation of Section 31 of Article III and Section 5 of Article I of the South Carolina Constitution inasmuch as it permits a sale of such property at a price less than its fair market value to a specified corporation.

16. The Plaintiff is informed and believes that the Educational Facilities Authority Act is unconstitutional, null and void in the case of the College and other church supported and church controlled institutions for the following additional reasons:

(a) The issuance of bonds pursuant to the Act would violate Article XI, Section 9 of the South Carolina Constitution which reads as follows:

> The property or credit of the State of South Carolina, or of any county, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source

derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.

(b) The Act violates Article I, Section 4 of the South Carolina Constitution and the First Amendment to the United States Constitution which prohibit the General Assembly from making any law respecting an establishment of religion or prohibiting the free exercise thereof.

17. The Plaintiff is informed and believes that the State Board, unless restrained by this Court, will proceed with the issuance of the revenue bonds sought in the College's Petition.

18. In order to give the public general notice of the institution of this action, the Plaintiff seeks an Order authorizing the publication of an appropriate notice which would permit any other interested parties to seek to intervene and raise any such additional questions as they may see fit.

WHEREFORE, the Plaintiff prays that this Honorable Court take jurisdiction of this matter, issue its Order authorizing the publication of a notice of the institution of this action and allowing any interested person opportunity to seek to intervene and raise such questions as he may deem proper within twenty (20) days following such publication, and after a full consideration of the matter, issue its Order enjoining and forbidding the Defendants constituting the State Board to proceed in the manner herein set forth and further declaring that the Act hereinabove mentioned is unconstitutional, null and void.

/s/ BRYANT & FANNING
BRYANT & FANNING,
358 St. Paul Street,
Orangeburg, South Carolina,
Attorneys for the Plaintiff

Orangeburg, S. C.
March 20th, 1970.

EXHIBIT "A"

THE STATE OF SOUTH CAROLINA

Executive Department

CERTIFICATE OF INCORPORATION
BY THE SECRETARY OF STATE

WHEREAS, Dr. J. Roy Robinson, Charleston, S. C.; Dr. John A. Hamrick, Charleston, S. C.; Dr. Chester F. Russell, North Charleston, S. C.

two or more of the offices or agents appointed to supervise or manage the affairs of BAPTIST COLLEGE AT CHARLESTON which has been duly and regularly organized, did on the 5th day of February, A.D. 1960, file with the Secretary of State a written declaration setting forth:

That, at a meeting of the aforesaid organization held pursuant to the by-laws or regulations of the said organization, they were authorized and directed to apply for incorporation.

That, the said organization holds, or desires to hold, property in common for Religious, Educational, Social, Fraternal, Charitable or other eleemosynary purpose, or any two or more of said purposes, and is not organized for the purpose of profit or gain to the members, otherwise than is above stated, nor for the insurance of life, health, accident or property; and that three days' notice in the Charleston News and Courier, a newspaper published in the County of Charleston, has been given that the aforesaid Declaration would be filed.

And Whereas, Said Declarants and Petitioners further declared and affirmed.

FIRST: Their names and residences are as above given.

SECOND: The name of the proposed Corporation is BAPTIST COLLEGE AT CHARLESTON

THIRD: The place at which it proposes to have its headquarters or be located is in Lower South Carolina, in area of Charleston County, with headquarters in Charleston County, or in Berkeley or Dorchester Counties.

FOURTH: The purpose of the said proposed Corporation is to establish, equip, maintain, conduct, own and operate a Baptist, liberal arts college for educational purposes; to solicit and collect funds for the work and support of the college; to receive funds or other property for such purposes by gift, grant, devise, bequest or otherwise; to buy and sell real estate and personal property for such purposes, and to hold the same; to borrow money for the purpose of the college, securing said loan or loans as may be required and proper under the laws of the State of South Carolina; and to do such acts and carry on the work of a well regulated college, making all necessary contracts and other acts necessary to the purposes of the corporation; and to do all those things which are conferred by the laws of this State upon corporations of a like kind.

FIFTH: The names and residences of all Managers, Trustees, Directors or other officers, are as follows:

NAMES	RESIDENCE
J. Roy Robinson	328 Meeting St., Charleston, S. C.
John A. Hamrick	61 Church St., Charleston, S. C.
W. C. Horldt	328 Meeting St., Charleston, S. C.
Luther Knight	Rt. 2, Box 63, Chas. Heights, S. C.
Chester F. Russell	1520 Remount Rd., N. Chas., S. C.
C. H. Beard	Hemingway, S. C.
Paul Bullington	955 Bruce Rd., Cayce, S. C.
W. H. Clapp	Georgetown, S. C.
A. S. Ellis	Olar, S. C.
Frank Fisher	Varnville, S. C.
Furman R. Gressette	St. Matthews, S. C.
E. C. Hageman	Rt. 2, Walterboro, S. C.
Clif Jones	Summerville, S. C.
George A. Jones	Beaufort, S. C.

William M. Jones	Walterboro, S. C.
Harold N. Kirkland	Wagener, S. C.
R. E. McNair	Allendale, S. C.
Fred Norris, Jr.	Eutawville, S. C.
F. Mitchell Ott	Branchville, S. C.
Wm. Austin Roberts	Aiken, S. C.
Fitzhugh Sanders	Jacksonboro, S. C.
Bill Smith	Aiken, S. C.
James H. Storm	Summerville, S. C.
Bert Williams	Moncks Corner, S. C.
Ray Williams	Cope, S. C.
B. Thomas White	W. Main St., Lake City, S. C.

SIXTH: That they desire to be incorporated: In perpetuity.

SEVENTH: That in the event of the dissolution of Baptist College at Charleston, the residual assets of the Corporation will be turned over to another organization which is itself exempt from Federal Income Tax under Section 501 (c) (3), or any other sections or amendments applicable thereto, of the Internal Revenue Code, or to the Federal, State, or local Government.

EIGHTH: All the powers of the corporation are hereby lodged in a board of trustees consisting of twenty-five members, who shall be elected by the South Carolina Baptist Convention. The term of office of each member shall be five years; except that for the members first elected, five shall be elected for terms of one year, five for terms of two years, five for terms of three years, five for terms of four years, and five for terms of five years, with the several terms commencing January first next after such election; provided, that the trustees first elected shall serve interim from the last day of the session of the Convention during which they were elected to January first next thereafter. The Convention shall have the power to provide by resolution, and change from time to time, the terms of office of the various members of the board, and may arrange so that the terms shall not expire at the same time.

The powers herein conferred on the Convention may in whole or in part be delegated by it to a majority of the board, or to such other persons or organizations as the Convention may deem proper.

Each member of the board of trustees shall hold office until his successor has duly been elected or appointed, and qualifies.

NINTH: The board of trustees shall manage the affairs of the Baptist College at Charleston or any agency entrusted to it, in trust for the S. C. Baptist Convention consistent with the charter of the college.

TENTH: The business and financial policy of the South Carolina Baptist Convention shall be strictly adhered to. No purchased real estate shall be sold or encumbered without the approval of the General Board of the Convention or the Executive Committee thereof.

ELEVENTH: Greek letter social fraternities, or sororities, are not allowed among the students of the institution, either on or off the campus.

TWELFTH: The said college may grant to students under its charge diplomas or honorary testimonials, in such form as it may designate. It may also confer such literary honors, degrees and diplomas as are usually granted by any university, college or seminary of learning in the United States.

THIRTEENTH: The charter may be amended only on approval of the South Carolina Baptist Convention. *Before* being revised May 8th, 1967, Articles Eight and Nine read as follows:

Article Eight:

". . . . and shall also have the right to provide for the exercise at all times the right of removal of any member or members of the board at any time, for any cause that may seem proper, or without cause."

Article Nine:

The board of trustees shall manage the affairs of the Baptist College at Charleston or any agency entrusted to it, subject to direction by the South Carolina Baptist Convention.

Before being revised September 1, 1967, Article Eight read as follows:

Article Eight:

All the powers of the corporation are hereby lodged in a board of trustees consisting of twenty-five members, who shall be elected by the South Carolina Baptist Convention and such other persons as may be substituted for them, or chosen to succeed them or any of them by said Convention or in pursuance of resolution adopted by it. The term of office of each member shall be five years; except that for the members first elected, five shall be elected for terms of one year, five for terms of two years, five for terms of three years, five for terms of four years, and five for terms of five years, with the several terms commencing January first next after such election; provided, that the trustees first elected shall serve interim from the last day of the session of the Convention during which they were elected to January first next thereafter. The Convention shall have the power to provide by resolution, and change from time to time, the terms of office of the various members of the board, and may arrange so that the terms shall not expire at the same time.

The powers herein conferred on the Convention may in whole or in part be delegated by it to a majority of the board, or to such other persons or organizations as the Convention may deem proper.

Each member of the board of trustees shall hold office until his successor has duly been elected or appointed, and qualifies.

EXHIBIT "B"

STATE OF SOUTH CAROLINA

PETITION TO THE EDUCATIONAL FACILITIES AUTHORITY

Your Petitioner, Baptist College at Charleston, respectfully shows:

1. Baptist College at Charleston (the College) is an eleemosynary educational corporation organized under the laws of the State of South Carolina, and owns and operates a four (4) year institution of higher learning in Charleston County, and the College does not receive any financial support from the State of South Carolina. the governing body of the College is a twenty-five (25) member Board of Trustees elected by the South Carolina Baptist Convention. The Board of Trustees is empowered under the College's charter to "manage the affairs of the Baptist College at Charleston or any agency entrusted to it, in trust for the South Carolina Baptist Convention consistent with the Charter of the College." A copy of the College's charter with all amendments to date is enclosed herewith.

2. Heretofore, the College has expended funds to defray a part of the cost of constructing and acquiring the necessary educational facilities designated below with the cost of each item as set opposite the same:

DESIGNATION	COST
Classroom Building	$ 452,829.03
Science/Administration Building	524,595.84
Student Center/Dining Hall Building	622,916.24
Operations/Maintenance Building	41,199.00
Equipment and furnishings for Science/ Administration Building	59,026.27
Land Improvements (Sewer, grading and paving, underground wiring, etc.)	1,194,563.92
Total	$2,895,130.30

The costs referred to above were incurred during the years 1965 and 1966 and were defrayed from the proceeds

derived from the issuance of $2,500,000 First Mortgage Serial Bonds, Series of July 1, 1966, together with other funds available for that purpose. At the present time $2,419,500 in principal amount of the said bonds are now outstanding, payable as follows: $15,000 on July 1, 1970; $15,500 on January 1, 1971, and $2,389,000 on July 1, 1971, together with interest at the rate of 6% per annum. The said bonds are secured by a first mortgage lien upon most of the College's facilities and by a pledge of revenues of the College.

3. In addition to the indebtedness set forth above in the amount of $2,419,500, the College has transferred from its Current Fund to its Plant Fund approximately $890,000 which has been used to purchase school equipment to the extent of approximately $450,000, to purchase library books to the extent of approximately $222,000, for other capital improvements, and for payment on the obligation of the Baptist College Foundation hereinafter mentioned.

4. The Baptist College Foundation, an eleemosynary corporation, originally incurred an indebtedness in the amount of $625,000 which was used to purchase dining hall equipment, dormitory equipment and mobile house trailers used for temporary dormitories at the College. All of the equipment and trailers acquired by the Baptist College Foundation were so acquired at the instance of the College, which utilizes the same as a part of its educational plant under a lease arrangement whereby the College is responsible to retire the said indebtedness incurred by the Baptist College Foundation. At the present time as a result of payments made by the College the unpaid principal indebtedness of the Baptist College Foundation has been reduced to $275,000 and it is the obligation of the College under the said lease arrangement to provide the necessary funds to pay the same as it becomes due in installment of $75,000 on September 1, 1970, and the balance of $200,000 on July 1, 1971, together with interest at the rate of 6% per annum.

5. In order to establish a more convenient schedule of payments and to reimburse, in part, its Current Fund, the College has determined to borrow $750,000 which will be used (a) to pay off the abovementioned indebtedness in-

curred by the Baptist College Foundation and (b) the balance to reimburse, in part, the Current Fund for moneys advanced to the Plant Fund and used as set forth hereinabove in paragraph 3, except that none of the moneys advanced to purchase library books will be reimbursed from the said loan.

6. The College wishes to avail itself of the provisions of the Educational Facilities Authority Act (Section 25 of Act No. 349 of the 1969 Acts of the South Carolina General Assembly) to the end that the Educational Facilities Authority established thereunder will issue pursuant to the authorizations of the Act $3,500,000 of bonds, the proceeds of which will be used to pay off the said indebtedness of the Baptist College Foundation and to reimburse, in part, the Current Fund as set forth in paragraph 5, supra, and to refund the bonds described in paragraph 2 on or prior to their final maturity date, to wit, July 1, 1971.

7. At the present time the College owns approximately 500 acres of land in Charleston County whereon its educational facilities are located. In order to effect the said financing pursuant to the Educational Facilities Authority Act the College proposes to convey to the Authority a fee simple title to the College facilities except (a) the library which is being financed in part by $750,000 loan from the Department of Health, Education and Welfare, (b) a dormitory which is being financed in part by a $1,770,000 loan from the Department of Housing and Urban Development, (c) a dormitory which is currently leased to the College (d) the Physical Education Building wherein are located facilities used for religious worship and (e) approximately 50 acres of land. Consequently, the College proposes to convey approximately 400 acres of land with the facilities located thereon and the College will lease the land and facilities so conveyed from the Authority under a Lease Agreement which will unconditionally obligate the College (a) to pay sufficient rentals to meet the principal and interest requirements as they become due on such bonds, (b) to impose an adequate schedue of charges and fees in order to provide adequate revenues with which to operate and maintain the said facilities and to make the rental payments specified in

sub-paragraph (a) supra, and (c) to pay all costs of operating and maintaining the said facilities. The said Lease Agreement will further provide that upon the payment of the said bonds the said facilities will be reconveyed to the College at a cost of $1.00.

8. The abovementioned facilities to be conveyed include land having a value of approximately $2,000,000, academic equipment having a value of approximately $514,000, buildings having a value of approximately $1,752,000, campus improvements (drainage, grading, and electrical, sewage and water systems) having a value of approximately $1,194,000 and property owned by the Baptist College Foundation under lease to the College (consisting of house trailers used for students dormitories and sundry dining hall equipment) having a value of approximately $625,000. The values set forth above aggregate $6,085,000 and are obtained in the case of the land from a current appraisal and otherwise from the College's report of audit dated May 31, 1969, as supplemented by letter from Thomas E. Buskirk & Associates to Dr. John A. Hamrick, dated September 4, 1969; and a copy of the said report of audit and of the letter dated September 4, 1969, are enclosed herein.

9. By action taken at its 1969 Annual Convention the South Carolina Baptist Convention gave its consent to the College "to borrow up to $4,000,000 on long term obligations of the College for the purpose of refinancing existing obligations including the refinancing of the $2,500,000 capital bond issue maturing in 1971, the repayment of all amounts due from the Plant Fund to the Current Fund and payment of other obligations of the College; and the Convention further agreed that the College may "obtain such funds from a bond issue or issues, tax free or otherwise, or by a loan or loans from federal, state or private lending sources as the Trustees may determine. Nevertheless, the obligation of the College under the Lease Agreement referred to above, will NOT be an obligation of the South Carolina Baptist Convention although the College will additionally secure the payment of the bonds by a pledge of the annual capital allocations made by the South Carolina Baptist Convention to

curred by the Baptist College Foundation and (b) the balance to reimburse, in part, the Current Fund for moneys advanced to the Plant Fund and used as set forth hereinabove in paragraph 3, except that none of the moneys advanced to purchase library books will be reimbursed from the said loan.

6. The College wishes to avail itself of the provisions of the Educational Facilities Authority Act (Section 25 of Act No. 349 of the 1969 Acts of the South Carolina General Assembly) to the end that the Educational Facilities Authority established thereunder will issue pursuant to the authorizations of the Act $3,500,000 of bonds, the proceeds of which will be used to pay off the said indebtedness of the Baptist College Foundation and to reimburse, in part, the Current Fund as set forth in paragraph 5, supra, and to refund the bonds described in paragraph 2 on or prior to their final maturity date, to wit, July 1, 1971.

7. At the present time the College owns approximately 500 acres of land in Charleston County whereon its educational facilities are located. In order to effect the said financing pursuant to the Educational Facilities Authority Act the College proposes to convey to the Authority a fee simple title to the College facilities except (a) the library which is being financed in part by $750,000 loan from the Department of Health, Education and Welfare, (b) a dormitory which is being financed in part by a $1,770,000 loan from the Department of Housing and Urban Development, (c) a dormitory which is currently leased to the College (d) the Physical Education Building wherein are located facilities used for religious worship and (e) approximately 50 acres of land. Consequently, the College proposes to convey approximately 400 acres of land with the facilities located thereon and the College will lease the land and facilities so conveyed from the Authority under a Lease Agreement which will unconditionally obligate the College (a) to pay sufficient rentals to meet the principal and interest requirements as they become due on such bonds, (b) to impose an adequate schedue of charges and fees in order to provide adequate revenues with which to operate and maintain the said facilities and to make the rental payments specified in

sub-paragraph (a) supra, and (c) to pay all costs of operating and maintaining the said facilities. The said Lease Agreement will further provide that upon the payment of the said bonds the said facilities will be reconveyed to the College at a cost of $1.00.

8. The abovementioned facilities to be conveyed include land having a value of approximately $2,000,000, academic equipment having a value of approximately $514,000, buildings having a value of approximately $1,752,000, campus improvements (drainage, grading, and electrical, sewage and water systems) having a value of approximately $1,194,000 and property owned by the Baptist College Foundation under lease to the College (consisting of house trailers used for students dormitories and sundry dining hall equipment) having a value of approximately $625,000. The values set forth above aggregate $6,085,000 and are obtained in the case of the land from a current appraisal and otherwise from the College's report of audit dated May 31, 1969, as supplemented by letter from Thomas E. Buskirk & Associates to Dr. John A. Hamrick, dated September 4, 1969; and a copy of the said report of audit and of the letter dated September 4, 1969, are enclosed herein.

9. By action taken at its 1969 Annual Convention the South Carolina Baptist Convention gave its consent to the College "to borrow up to $4,000,000 on long term obligations of the College for the purpose of refinancing existing obligations including the refinancing of the $2,500,000 capital bond issue maturing in 1971, the repayment of all amounts due from the Plant Fund to the Current Fund and payment of other obligations of the College; and the Convention further agreed that the College may "obtain such funds from a bond issue or issues, tax free or otherwise, or by a loan or loans from federal, state or private lending sources as the Trustees may determine. Nevertheless, the obligation of the College under the Lease Agreement referred to above, will NOT be an obligation of the South Carolina Baptist Convention although the College will additionally secure the payment of the bonds by a pledge of the annual capital allocations made by the South Carolina Baptist Convention to

the College. For the calendar year 1970 the capital allocation by the South Carolina Baptist Convention to the College amounted to $224,000 and the College expects these annual capital allocations to continue and increase at the rate of 4% per year. However, the current schedule of annual capital allocations to the College which was established in 1968 by the South Carolina Baptist Convention extends through 1972, inasmuch as the capital allocation schedules are set up for 5 year periods.

10. At the present time the four (4) year institution of higher learning owned and operated by the College as aforesaid (and known as the Baptist College at Charleston) is not yet fully accredited but your Petitioners expect that it will receive full accreditation in December, 1970 from the Southern Association of Colleges and Secondary Schools.

11. The College's regular enrollment for the year 1969-70 school year is 1548 (exclusive of night students which number approximately 600) and the regular enrollment for each of the past years (exclusive of night students) was as follows:

1968-69	1448
1967-68	1050
1966-67	848
1965-66	375

Approximately 95% of the College's student body is composed of South Carolina residents.

Although the College is supported by the South Carolina Baptist Convention there are no religious qualifications for admission and there are enrolled at the Baptist College at Charleston students of many different religions, approximately 60% of whom are Baptists.

12. Before proceeding further with its financing arrangement, the College is seeking the Authority's approval of the proposed financing whereby the Authority would issue pursuant to the Educational Facilities Authority Act $3,500,000 of bonds whose proceeds would be used for the purposes set forth above. None of such bonds shall constitute a debt or liability of the State or of any political subdivision thereof and none of such bonds shall be secured by any pledge of the faith and credit of the State or of any

such political subdivision, but all such bonds shall be payable soley from the revenues provided therefor by the College under the said Lease Agreement. Such bonds shall be secured by an assignment of the rentals to be paid by the College under the Lease Agreement abovementioned (including the College's pledge of the capital allocations from the South Caroina Baptist College and to discharge that obligation) and by a Trust Indenture between the Authority and a bank yet to be named which would constitute a forecloseable lien upon the property conveyed to the Authority and leased to the College.

13. In the event such preliminary approval is given the College will present to the Authority for its consideration appropriate forms of a Lease Agreement and Trust Indenture including the maturity schedule and interest rates of the proposed bonds.

WHEREFORE, the College prays that the Authority indicate its preliminary approval of the financing arrangement outline hereinabove whereby the Authority would issue not exceeding $3,500,000 of bonds pursuant to the Educational Facilities Authority Act for the purposes set forth above.

January 6th, 1970.

BAPTIST COLLEGE AT CHARLESTON

By John A. Hamrick, President

Attest:

Fred K. Norris, Jr., Chairman
of the Board of Trustees,
Baptist College at Charleston
Paul M. Pridgen, Jr., Secretary,
Baptist College at Charleston

ANSWER OF BAPTIST COLLEGE AT CHARLESTON

(omitting caption and verification)

The Defendant Baptist College at Charleston answers the Plaintiff's Complaint as follows:

1. This Defendant admits the allegations of the Complant set forth in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 thereof.

2. This Defendant admits, on information and belief, the allegations of the Complaint set forth in paragraphs 1, 17 and 18.

3. With regard to the allegations of paragraph 13 of the Complaint, this Defendant admits that the proposed financing would benefit this Defendant which is a private eleemosynary corporation and this Defendant denies the remaining allegations of paragraph 13 and specifically alleges that the proposed financing will provide for the orderly handling of indebtedness heretofore incurred by this Defendant for the acquisition and construction of its educational plant and upon the completion of the proposed financing this Defendant will be in a better position to meet the needs for higher education in South Carolina, which will directly benefit the State of South Carolina and all of its citizens.

4. With regard to the allegations of paragraph 14 of the Complaint, this Defendant alleges that the College operated by this Defendant under the name of Baptist College at Charleston is a non-sectarian institution of higher learning with an enrollment for the 1969-1970 school year of 1548 (exclusive of night students which number approximately 600) representing many different religions. This Defendant admits that the said College receives financial support from the South Carolina Baptist Convention and from members of other denominational groups, foundations, industries, etc., and further alleges that there are no religious qualifications for admission to the said College and that approximately 60% of the College's student body are Baptist, and approximately 40% of the student body are of other denominations.

5. This Defendant denies the allegations of the Complaint set forth in paragraphs 15 and 16 thereof and expressly alleges that the Educational Facilities Authority Act is constitutional in all respects and that the proposed action of the State Budget and Control Board to issue revenue bonds pursuant to the said Act as requested by this Defendant would not violate provisions of the State or Federal Constitutions.

FURTHER ANSWERING THE COMPLAINT AND AS AN ADDITIONAL DEFENSE THERETO

6. The Educational Facilities Authority Act (Section 25 of Act 349 of 1969) specifically provides that any bonds issued pursuant thereto shall be payable solely out of the revenues derived by the Authority from the project for which such bonds are issued and further in subsection (K) the said Act provides as follows:

> "(K) Revenue bonds issued under the provisions of this section shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement to the effect that neither the State of South Carolina nor the authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. The issuance of revenue bonds under the provisions of this act shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment."

FURTHER ANSWERING THE COMPLAINT AND AS AN ADDITIONAL DEFENSE THERETO

7. If the proposed financing requested by this Defendant is consummated the bonds to be issued by the Authority which will be repaid from revenues to be paid by this Defendant will be issued as tax free obligations, the interest on which will not be subject to Federal Income Taxes and, as a result, the interest cost to be borne by this Defendant will be less than the interest cost which would have to be borne by this Defendant if this Defendant

should refinance its indebtedness through the issuance of obligations the interest on which is taxable. Consequently, the financial burden on this Defendant will be less if the requested financing is completed and this Defendant will, therefore, be better able to continue to meet the needs for higher education in South Carolina. Furthermore, of the present enrollment at the Baptist College at Charleston approximately 95% of the student body are residents of South Carolina. Thus, the proposed financing will directly promote higher education in South Carolina and benefit the citizens of this State.

FURTHER ANSWERING THE COMPLAINT AND AS AN ADDITIONAL DEFENSE THERETO

8. While the South Carolina Baptist Convention elects the Board of Trustees of this Defendant and contributes financial support to the opertion of this Defendant's College, the said College is not either wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization, but is under the control of the said Board of Trustees as is more fully set forth in this Defendant's Charter.

FURTHER ANSWERING THE COMPLAINT AND AS AN ADDITIONAL DEFENSE THERETO

9. The Educational Facilities Authority Act is a general law for the benefit of any "institution for higher learning" which is defined therein to mean any nonprofit educational institution within the State authorized by law to provide a program of education beyond the high school level and which does not receive State financial support but shall not include any State supported institution; and the said Act, therefore, does not violate the constitutional prohibition against special legislation contained in Article III, Section 34, subsection 9 of the South Carolina Constitution.

FURTHER ANSWERING THE COMPLAINT AND AS AN ADDITIONAL DEFENSE THERETO

10. The option proposed to be granted under the said Act by which the participating institution may repurchase

violate Article III, Section 31 or Article I, Section 5 of the South Carolina Constitution inasmuch as the property involved is acquired by the State for security purposes only in order to carry out the intent of the legislature to provide for the issuance of tax free obligations in order to benefit institutions of higher learning and the property rights of the State in and to the property so acquired is, therefore, subject to the conditions imposed at the time of its acquisition which include such an option.

FURTHER ANSWERING THE COMPLAINT AND AS AN ADDITIONAL DEFENSE THERETO

11. This Defendant is advised and believes that the assistance intended to be provided by the Act to participating institutions of higher learning is provided through similar legislation in many other states to institutions of higher learning located therein, and the Act therefore equalizes the educational opportunities available in South Carolina with those available in other states.

WHEREFORE, having fully answered the Complaint the Defendant prays that this Honorable Court take jurisdiction of this matter and after due consideration issue its Order dismissing the Complaint and sustaining the right of the State Board acting as the Authority to proceed with the issuance of revenue bonds pursuant to the Act as requested by this Defendant.

SINKLER, GIBBS & SIMONS
Attorneys for the Baptist
College at Charleston

Charleston, South Carolina
March 31st, 1970

ANSWER OF THE BUDGET AND CONTROL BOARD AND OF THE ATTORNEY GENERAL

(omitting caption and verification)

The defendants Robert E. McNair, Grady L. Patterson, Jr., John H. Mills, Edgar A. Brown, Robert J. Aycock and Daniel R. McLeod, answering the Complaint herein, would respectfully show the Court that:

1. Each and every allegation of the Complaint not hereinafter admitted, qualified or explained is denied.

2. The allegations of paragraph 1 of the Complaint are admitted upon information and belief.

3. The allegations of paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 17 and 18 of the Complaint are admitted.

4. With regard to the allegations of paragraph 13 of the Complaint, these defendants admit, upon information and belief, that the proposed financing would benefit the Baptist College at Charleston, which is a private eleemosynary corporation, and deny the remaining allegations of paragraph 13 and specifically allege, upon information and belief, that the proposed financing will provide for the orderly handling of indebtedness heretofore incurred by the Baptist College at Charleston for the acquisition and construction of its educational plant and upon the completion of the proposed financing the Baptist College at Charleston will be in a better position to meet the needs for higher education in South Carolina, which will directly benefit the State of South Carolina and all of its citizens.

5. With regard to the allegations of paragraph 14 of the Complaint, these defendants admit that the Charter of the Baptist College at Charleston provides hat the College will be managed by a Board of Trustees elected by the South Carolina Baptist Convention "in trust for the South Carolina Baptist Convention" and denies, upon information and belief, the remaining allegations of paragraph 14.

6. The allegations of paragraphs 15 and 16 of the Complaint are denied.

7. In the event this honorable Court finds that the Act is unconstitutional as applied to the defendant South Carolina Baptist College at Charleston, it is specifically denied that the Act is unconstitutional in its possible application to other institutions for higher learning.

WHEREFORE, having fully answered the Complaint herein, these defendants pray for an order dismissing the Complaint and sustaining the right of the State Budget and Control Board, acting as the Educational Facilities Authority, to proceed with the issuance of revenue bonds pursuant to the Act as requested by the Baptist College at Charleston

and for such other and further relief as may be just and proper, together with costs.

DANIEL R. McLEOD,
Attorney General,
C. PINCKNEY ROBERTS,
Assistant Attorney General,
Attorneys for the Budget and Control Board of South Carolina and the Attorney General of South Carolina.

Columbia, S. C.
April 14, 1970

ORDER OF PUBLICATION

The Plaintiff has instituted the captioned action contesting the constitutionality of he Educational Facilities Authority Act (Section 25 of Act No. 349 enaced by the 1969 South Carolina General Assembly) in general and further contesting the constitutionality of the use of the said Act for the benefit of the Defendan Baptist College at Charleston.

The Defendants include the said Baptist College at Charleston, the members of the Budget and Control Board of the State of South Carolina and the Attorney General of the State of South Carolina. Under the terms of the said Act the said Budget and Control acting as the Educational Facilities Authority is empowered to issue revenue bonds pursuant thereto. The Plaintiff alleges that the said Budget and Control Board has heretofore given preliminary approval at the request of the said Baptist College at Charleston that the Budget and Control Board issue not exceeding $3,500,000 of revenue bonds pursuant to the said Act for the purpose of refunding certain obligations of the Baptist College at Charleston.

The Plaintiff wants to advise the public of the institution of this action in the event any other person wants to seek to intervene and raise any other question regarding the constitutionality of the Act. To that end the Plaintiff asks this Court to authorize the publication of a Notice in the form hereinafter set forth in newspapers having cir-

culation throughout South Carolina. The Plaintiff is not required by statute to publish such a Notice and there is no statutory procedure which has been called to my attention providing for the same. However, Plaintiff's request is designed to protect the interest of the public generally and the publication requested will not adversely affect any other parties to this action.

NOW, THEREFORE, on motion of Bryant & Fanning, Attorneys for the Plaintiff, it is

ORDERED, that the following Notice be published once in the Columbia, S. C. "The State" following the full caption of this action:

NOTICE TO ALL TAXPAYERS OF THE STATE OF SOUTH CAROLINA

The Plaintiff above named has instituted the captioned action in the Court of Common Pleas for Charleston County wherein his Summons and Complaint were filed on March 20, 1970. The Plaintiff is a resident and taxpayer of Charleston County and of the State of South Carolina and brings this action representing all of the taxpayers of South Carolina. The Defendants include the members of the Budget and Control of the State of South Carolina (the State Board), Daniel R. McLeod, as Attorney General of the State of South Carolina, and Baptist College at Charleston, an eleemosynary corporation.

At its 1969 Session, the South Carolina General Assembly enacted the Educational Facilities Authority Act (the Act) which appears as Section 25 of Act No. 349 of 1969. Under the provisions of the Act the State Board, acting as the Educational Facilities Authority (the Authority) is authorized to provide financing for institutions of higher learning as defined in the Act by the issuance of revenue bonds payable solely out of the revenues of the Authority derived from the particular project for which they are issued and secured by a mortgage on the project so financed. The Act further authorizes the issuance of revenue bonds to refund outstanding obligations.

Baptist College at Charleston (the College) owns an educational plant in Charleston County and has petitioned

the Authority for the issuance of not exceeding $3,500,000 of revenue bonds pursuant to the Act in order to refund certain obligations more fully set forth in the Complaint and the Authority at its meeting held January 16th, 1970 gave preliminary approval to the requested financing.

The Plaintiff in this action seeks to enjoin the issuance of any such revenue bonds. The Plaintiff alleges that the Act is unconstitutional upon several grounds and that in any event utilization of the Act for the benefit of the College and any other church supported or church affiliated institutions would violate, inter alia, the provisions of Article XI, Section 9 of the South Carolina Constitution which prohibits the use of the property or credit of the State in aid of any college which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.

Additional copies of the Complaint are available at the office of the Clerk of the Court of Common Pleas for Charleston County, located in the Charleston County Courthouse, Charleston, South Carolina.

The within Notice is being published in the Columbia, S. C. "The State" pursuant to the Order of the Honorable Clarence E. Singletary, Resident Judge, Ninth Judicial Circuit. Any interested person or persons may, if so minded, seek to intervene in this action by filing with this Court and serving upon the undersigned attorneys at their address shown below not later than 20 days following the date of this publication a Petition that he or they be permitted to intervene upon the grounds stated therein.

Not sooner than 20 days following the publication of this Notice the Plaintiff will seek a hearing on the issues to be determined in this action.

BRYANT & FANNING,
358 St. Paul Street,
Orangeburg, S. C. 29115,
Attorneys for the Plaintiff.

Publication Date:
March 25, 1970.

culation throughout South Carolina. The Plaintiff is not required by statute to publish such a Notice and there is no statutory procedure which has been called to my attention providing for the same. However, Plaintiff's request is designed to protect the interest of the public generally and the publication requested will not adversely affect any other parties to this action.

NOW, THEREFORE, on motion of Bryant & Fanning, Attorneys for the Plaintiff, it is

ORDERED, that the following Notice be published once in the Columbia, S. C. "The State" following the full caption of this action:

NOTICE TO ALL TAXPAYERS OF THE STATE OF SOUTH CAROLINA

The Plaintiff above named has instituted the captioned action in the Court of Common Pleas for Charleston County wherein his Summons and Complaint were filed on March 20, 1970. The Plaintiff is a resident and taxpayer of Charleston County and of the State of South Carolina and brings this action representing all of the taxpayers of South Carolina. The Defendants include the members of the Budget and Control of the State of South Carolina (the State Board), Daniel R. McLeod, as Attorney General of the State of South Carolina, and Baptist College at Charleston, an eleemosynary corporation.

At its 1969 Session, the South Carolina General Assembly enacted the Educational Facilities Authority Act (the Act) which appears as Section 25 of Act No. 349 of 1969. Under the provisions of the Act the State Board, acting as the Educational Facilities Authority (the Authority) is authorized to provide financing for institutions of higher learning as defined in the Act by the issuance of revenue bonds payable solely out of the revenues of the Authority derived from the particular project for which they are issued and secured by a mortgage on the project so financed. The Act further authorizes the issuance of revenue bonds to refund outstanding obligations.

Baptist College at Charleston (the College) owns an educational plant in Charleston County and has petitioned

the Authority for the issuance of not exceeding $3,500,000 of revenue bonds pursuant to the Act in order to refund certain obligations more fully set forth in the Complaint and the Authority at its meeting held January 16th, 1970 gave preliminary approval to the requested financing.

The Plaintiff in this action seeks to enjoin the issuance of any such revenue bonds. The Plaintiff alleges that the Act is unconstitutional upon several grounds and that in any event utilization of the Act for the benefit of the College and any other church supported or church affiliated institutions would violate, inter alia, the provisions of Article XI, Section 9 of the South Carolina Constitution which prohibits the use of the property or credit of the State in aid of any college which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.

Additional copies of the Complaint are available at the office of the Clerk of the Court of Common Pleas for Charleston County, located in the Charleston County Courthouse, Charleston, South Carolina.

The within Notice is being published in the Columbia, S. C. "The State" pursuant to the Order of the Honorable Clarence E. Singletary, Resident Judge, Ninth Judicial Circuit. Any interested person or persons may, if so minded, seek to intervene in this action by filing with this Court and serving upon the undersigned attorneys at their address shown below not later than 20 days following the date of this publication a Petition that he or they be permitted to intervene upon the grounds stated therein.

Not sooner than 20 days following the publication of this Notice the Plaintiff will seek a hearing on the issues to be determined in this action.

BRYANT & FANNING,
358 St. Paul Street,
Orangeburg, S. C. 29115,
Attorneys for the Plaintiff.

Publication Date:
March 25, 1970.

IT IS FURTHER ORDERED that any interested person or persons may seek to intervene in this action and raise such questions as he or they deem proper by filing with this Court and serving upon the Plaintiff's Attorneys at their address within twenty (20) days following such publication a Petition that he or they be allowed to intervene in this action upon the grounds stated in said Petition; and

IT IS FURTHER ORDERED that this Order shall not bar intervention herein after the expiration of the said twenty (20) day period by a person who shows just cause for his delay in seeking to intervene herein.

/s/ CLARENCE E. SINGLETARY,
Judge of the Ninth Judicial Circuit.

Charleston, S. C.
March 20, 1970

DECREE

At issue here is the constitutionality of the recently enacted Educational Facilities Authority Act which appears as Section 25 of Act No. 349 of 1969 which became effective June 4, 1969 (hereinafter referred to as the Act). This action is brought for a declaratory judgment pursuant to the provisions of Sections 10-2001, et seq., seeking a holding that the Act is unconstitutional and that certain actions taken pursuant thereto by the Defendants herein are invalid and should be enjoined.

In his Complaint the Plaintiff alleges that he is a taxpayer of the State of South Carolina and a resident of Charleston County, whose interest would be adversely affected by the Defendants who constitute the Budget and Control Board of South Carolina, and, therefore, has standing to challenge the validity of the Act and the actions of the Defendants thereunder. It is clear that his contention in this respect is correct. *Shillito v. City of Spartanburg,* 214 S. C. 11, 51 S. E. (2d) 95; 52 Am. Jur., Sec. 3, Pg. 3.

It also appears that a justiciable controversy exists.

The returns filed on behalf of the Defendants raise no issues of fact and accordingly it is entirely appropriate

that the case be disposed of on the pleadings and on the exhibits which have been presented to me for my consideration.

Under the provisions of the Act the Budget and Control Board of the State of South Carolina (the State Board) acting as the Educational Facilities Authority (the Authority) is authorized to provide financing for institutions of higher learning as defined in the Act by the issuance of revenue bonds payable solely out of the revenues of the Authority derived from the particular project for which they are issued and secured by a mortgage on the project so financed. The Act further provides that revenue bonds may be issued to refund outstanding obligations issued by an institution of higher learning for the cost of a project as defined in the Act.

The Defendant, Baptist College at Charleston, an eleemosynary South Carolina corporation (the College) has petitioned the Authority seeking the preliminary approval of the Authority for the issuance of not exceeding $3,500,000 of revenue bonds pursuant to the said Act for the purpose of (a) paying off outstanding indebtedness of the Baptist College Foundation incurred for the purpose of acquiring certain equipment and trailers utilized as a part of the College's educational plant (the payment for which the College is responsible) in the amount of approximately $275,000; (b) reimbursing in part the College's Current Fund for moneys advanced to the College's Plant Fund used to purchase school equipment and other capital improvements and for the payment of the aforesaid obligation of the Baptist College Foundation; and (c) refunding an outstanding indebtedness of the College in the amount of approximately $2,500,000 represented by the College's first mortgage serial bonds dated July 1, 1966.

The said Petition of the College proposes that the College convey approximately 400 acres of land with the facilities located thereon to the Authority which shall in turn lease the said land and facilities back to the College at a rental which will be sufficient to meet the payment of principal and interest as they become due on the proposed bonds. Such lease will further provide that the College,

upon payment of the bonds, shall reacquire the said land and facilities. at no cost to the College.

At its meeting held January 16th, 1970 the Authority adopted a Resolution giving preliminary approval to the financing arrangements outlined in the Petition of the College to the Authority subject to approval by the Authority of the final terms and conditions of the proposed financing and of the terms and provisions of the Lease Agreement and Trust Indenture to be used in connection with such financing.

It has been agreed that all conditions imposed by the Educational Facilities Authority Act have been or will be duly met so that squarely at issue is the constitutionality of the Act and the validity of the actions of the Defendants pursuant thereto.

Plaintiff challenges that the Act is invalid on five grounds:

1. The undertaking by the State to finance private educational facilities is not a public purpose for which the State may issue bonds;

2. The Act violates the first sentence of Section 6 of Article X which states ". . . the credit of the State shall not be pledged or loaned for the benefit of any individual, company, association or corporation . . .".

3. The proposed actions of the Authority would deprive Plaintiff of property without due process of law in violation of the provisions of Section 5 of Article I of the South Carolina Constitution inasmuch as the Authority would expend public funds for the benefit of a private corporation.

4. The Act and the proposed actions of the Authority violate the equal protection clauses of the State and Federal Constitutions inasmuch as certain privileges and immunities are afforded to "institutions of higher learning" as defined in the Act which are not available to all classes of persons generally nor available to all persons in the field of education generally.

5. The option proposed to be granted to the College to purchase land and facilities at a nominal value violates the public policy of the South Carolina Constitution in

violation of Section 31, Article III and Section 5 of Article I inasmuch as it permits a donation of property of the State.

It is further contended by the Plaintiff that the Act is unconstitutional, null and void in the case of the College and other church supported institutions for the reason that the issuance of bonds pursuant to the Act would violate Article XI, Section 9 of the South Carolina Constitution forbidding aid from the State of South Carolina to any college, etc. which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination and for the further reason that said Act violates the first amendment to the United States Constitution and Article I, Section 4 of the South Carolina Constitution which prohibits the making of any law respecting an establishment of religion or prohibiting the free exercise thereof.

I shall dispose of these questions in the order set forth above.

All legislative action should serve a public rather than a private purpose. The Act recites that in order for the people of the State to increase their commerce, welfare and prosperity and improve their health and living conditions it is essential that this and future generations of youths be given the fullest opportunity to learn and to develop their intellectual and mental capacities. The Act takes note that to meet this goal it is essential that institutions for higher learning within the State be provided with appropriate additional means to assist such youth in achieving the required level of learning and development of their intellectual and mental capacities. The true purpose of the Act is to provide a measure of assistance and an alternative method to enable institutions for higher learning in the State to provide the facilities and structures which are sorely needed to accomplish this aim to the public benefit and good of all the people of this State. This purpose is served by the issuance of revenue bonds pursuant to the Act for the purpose of refunding outstanding obligations originally incurred, as in the instant case, for purposes for which bonds can be issued. It is too late to question whether or not the promotion of secular education is a public purpose as it is universally acceptable as a proper public pur-

pose. *Everson v. Board of Education,* 330 U. S. 1, 7, 9, 67 S. Ct. 504, 91 L. Ed. 711 at 719; *Cochran v. Louisiana State Board of Education,* 281 U. S. 370, 374, 50 S. Ct. 335, 74 L. Ed. 913. If the general public benefit is the dominant interest served, constitutional demands are not offended, even though the aid inures to the benefit of a private institution.

In regard to the second attack on the constitutionality of the Act, based on the contention that the credit of the State would be pledged or loaned for the benefit of a corporation in violation of Section 6 of Article X, the case of *Feldman v. the City of Charleston,* 23 S. C. 57, has been cited to me as well as the decision in the case of *Bolton v. Wharton,* 163 S. C. 242, 161 S. E. 454.

In the *Feldman* case, the City of Charleston issued bonds to lend their proceeds to those whose houses had been destroyed in the great conflagration of the eighteen sixties. The bonds were payable from ad valorem taxes levied upon the taxable property in Charleston. However, the City of Charleston had procured mortgages from those to whom it had loaned money covering the residences built with the proceeds of the bonds. From the facts in this case, it appears that for many years the City of Charleston recognized the validity of the bonds and made payments on account of the coupons, but when it went into default, it raised for the first time the question that the power of the legislature to authorize bonds and the actions of the City officials in disposing of them violated the constitutional provisions requiring that the purpose for which the proceeds of public bonds be expended be public in nature. In holding that the Act of the legislature and the subsequent action of the City of Charleston in issuing the bonds were unconstitutional, this Court stated:

> "However certain and great the resulting good to the general public it does not by reason of its comparative importance cease to be incidental. The incidental advanage to the public or to the State which results from the promotion of private interests and the prosperity of private enterprises or business does not justify their aid by the use of public money raised

by taxation *or for which taxation may become necessary.*" (Emphasis added.)

Notwithstanding, that as a result of the devastation resulting from the war, much of Charleston lay in waste, the Court held that the basic purpose of the loan was private rather than public, and for that reason, the bonds were, insofar as the City of Charleston was concerned, null and void. It is significant, however, that the Court held that it was not only the right, but the duty of the City Council to collect from those who had borrowed the proceeds of the bonds the sums due by them and to apply the same to the payment of the fire loan bonds. Hence, the basic holding in this case, denied the validity of the bonds simply because they were payable from the proceeds of taxation.

In the *Bolton* case, the suit was brought upon a note purported to be issued by the City of Union as a tax anticipation note, but in reality simply a promissory note, issued to obtain funds with which to underwrite stock in a proposed local silk manufacturing corporation from which Union was expected to incur benefits resulting from the increased taxable values, from advancement of property values of property in general and from increased impetus to the life of the community. The majority of the Court held that because there was an absence of both constitutional and statutory authority to issue the notes they were null and void.

The following is taken from the decision of Circuit Judge Sease and whose opinion was affirmed *in toto* by the Supreme Court (161 S. E. 454, 457):

> "The power given to the city council to issue bonds, so as to bind not only all the taxpayers of the city, but their children as well, is a very high confidence and trust, and can be properly exercised for no other purpose than 'for the public use of the corporation,' no matter how great the temptation may be. . . . We cannot suppose that it was intended to give the city council, as such, the right to go into commerce, to buy for the purpose of selling goods, or to enter into any

private business or speculation whatever. *Mauldin v. City Council of Greenville* (1890), 33 S. C. 1, 24, 11 S. E. 434, 438, 8 L. R. A. 291. The language of Mr. Justice Marion in *Haesloop v. City Council of Charleston, supra,* 123 S. C. page 286, 115 S. E. 596, 601, seems decisive that these obligations were not issued to realize funds to be put to a purpose "essentially public" in their nature: "In ascertaining what is a public purpose within the power to tax, such benefits from a proposed expenditure as will accrue from increased taxable values, from enhancement of property values generally, and from increased impetus to the commercial life of the community will ordinarily be considered of too incidental or secondary a character to justify an outlay of public funds.' Applying these rules of law to the instant obligations, it seems beyond cavil that the notes were not issued for a valid public purpose."

Significantly again however, the only method by which the City of Union might discharge the obligation sued on in the *Bolton* case was through the levy of taxes.

The Act here requires that the bonds to be issued be paid solely from the revenues to be paid by the participating institution for higher education, as defined in the Act, and it specifically provides that all bonds issued under the Act shall contain on the face thereof a statement to the effect that neither the State of South Carolina nor the Authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power in South Carolina or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bond. The Act further provides that the issuance of revenue bonds thereunder shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment. Clearly, therefore, the only funds pledged for the payment of the bonds are lease rental payments to be made by the Bapist College

at Charleston. Since it is conceded that the only remedies of the bondholders in the event of default is to pursue the rights of the Authority to collect from its lessee, and if need be, to foreclose the trust indenture and have the property sold, the State's credit can never be adversely affected. This situation is in reality akin to the rights of those who held the City of Charleston Fire Loan Bonds to proceed against the persons to whom the City had loaned the proceeds of those bonds. Accordingly, the result of the *Feldman* case clearly supports the validity of the Act which for all intents and purposes is analogous to the South Carolina Industrial Revenue Bond Act, the validity of which was upheld in *Elliott v. McNair* (1967), 250 S. C. 75, 156 S. E. (2d) 421.

It is contended that the Act violates the due process clause of the State Constitution inasmuch as it permits the expenditure of public moneys for the benefit of a private corporation. I point out that under the Act no public moneys as such can be expended to such institutions for higher education in the construction, financing and refinancing of projects as such term is defined in the Act. The entire cost thereof is financed through the sale of bonds which are payable by the participating institution for higher education. No public money is involved.

It is next contended that the Defendant, the Baptist College at Charleston, and the other institutions for higher education which will utilize the Act, are granted special privileges in violation of the privileges and immunity section of the Constitution. It is argued that the benefits of the Act are not available to all classes or persons generally nor available to all persons in the field of education generally. It is argued that such persons, both in the field of education and without, who do not qualify under the Act, must invariably pay a higher rate of interest because of the fact that the interest on bonds issued by the Act is not subject to income taxation. Plaintiff overlooks the basic object of the Act in setting forth this argument. It is not the purpose of the Act to afford any special privileges. It is, as stated above, the purpose of the Act to assist institutions for higher learning in the construction, financing and refinancing of their projects as defined in the Act, which in turn

results in the benefit to the people of the State in the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions. The fact that the Baptist College at Charleston and other higher education institutions like it obtain advantages from the Act is incidental. See *Elliott v. McNair, supra.*

It is next contended that the option proposed to be granted to the Defendant, Baptist College at Charleston, to purchase land and facilities at a nominal value violates the public policy of the State of South Carolina and is in violation of Section 31 of Article III and Section 5 of Article I of the South Carolina Constitution inasmuch as it permits the donation of such property. The former clause provides that lands belonging to the State shall never be donated to private corporations and that such lands shall not be sold to corporations "for less price than that for which it can be sold to individuals". The Act in paragraph H actually requires the reconveyance to the participating institution for higher education at such time that the principal of and interest on the bonds of the Authority issued to finance the cost of a particular project or projects, including any revenue refunding bonds issued to refund and refinance such revenue bonds, have been fully paid and retired, or when adequate provision has been made to fully pay and retire the same, and all other conditions of the Trust Indenture authorized in its name have been satisfied, and the lien of such Trust Indenture has been released in accordance with the provisions thereof. I do not find in our decisions nor has any decision been submitted to me which requires public agencies to sell property at not less than full market value. Our decisions clearly hold that a public agency may exercise discretion in effecting the sale of public property and that neither public bidding is required nor is there a requirement that the maximum price be obtained. Indeed, indirect benefits to result to the public may properly be considered. When such reconveyance shall take place, it will be a part of the overall contract, and of the consideration for the contract existing *ab initio,* and not a contract arising subsequent to the issuance of the bonds. Here again the situation is analogous to the option to purchase the industrial revenue project granted the industry by the

South Carolina Industrial Revenue Bond Act, the validity of which provision was upheld in *Elliott v. McNair, supra.*

The major thrust of the Plaintiff's attack is the contention that the issuance of the Bonds pursuant to the Act would violate Article XI, Section 9 of the Constitution, which reads as follows:

> "The property or credit of the State of South Carolina, or of any county, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization."

It has been made to appear to me that the Baptist College at Charleston is a corporation organized and existing under the laws of the State of South Carolina and in its Charter, the purpose of the said corporation, among other things, is to establish, equip, maintain, conduct and operate a Baptist Liberal Arts College for educational purposes. Further, all the powers of the corporation are lodged in a Board of Trustees consisting of 25 members, all of whom are elected by the South Carolina Baptist Convention. It has been further shown that approximately 60% of the enrollment of the college students of the Baptist College are of the Baptist faith. It has also been shown that this is about the ratio of Baptist to non-Baptist in this area of the State. Under any interpretation of this provision of our Constitution, however, there is no question but that the operation of the Baptist College at Charleston is at least in part under the direction or control of the South Carolina Baptist Convention. Thus, the question is presented whether or not the proposed actions of the Defendants would constitute a loan or gift of the property or credit of the State of South Carolina in contravention of the Constitution. I do not find that any property of the State of South Carolina, as such, is involved inasmuch as the State will acquire (at no

cost to the State) a title subject to certain conditions, one of which is an option in favor of the Baptist College to reacquire the property so conveyed to the State; and thus the question is limited to whether or not the credit of the State of South Carolina has been given, loaned or contracted for, appropriated or otherwise used directly or indirectly, in aid of the Baptist College. In view of my holding above, that the credit of the State is in no way involved in the proposed actions of the Defendants, I find that the credit of the State can in no way be considered as aiding in any way the Baptist College at Charleston.

The next contention of the Plaintiff to the effect that the State is enacting legislation respecting an establishment of religion, or prohibiting the free exercise thereof, in contravention of Section 4, Article I, of the South Carolina Constitution and of the first amendment of the Federal Constitution, gives me greater concern. I do not find any South Carolina cases in point on this question, and there have been no United States Supreme Court cases called to my attention directly attacking the Higher Education Facility Acts which have been adopted in several of the States. There have been, however, three significant United States Supreme Court cases which bear on this point, which require consideration.

The first is *Everson v. Board of Education,* 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), where an Establishment Clause challenge was made to a New Jersey statute which provided for the reimbursement to parents of parochial school children, as well as to parents of public school children for the cost of bus transportation to and from school. The Supreme Court held that the statute would not violate the Establishment Clause. In the course of its opinion, the Court stated:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they be called, or whatever form they may adopt to teach or practice religion."

Although this language, read in isolation, might suggest that the Establishment Clause renders impermissible any

government aid to church-related educational institutions, such suggestion is dispelled by the Court's actual decision sustaining the statute. The Court so held even though it recognized the parochial schools received some benefit from state subsidization of bus transportation for parochial school children. The Court noted that a state could not exclude individuals *"because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." Since it viewed state subsidization of bus transportation as a public welfare measure in the same category as such general government services relating to schools as police and fire protection, sewage disposal, public highways and sidewalks, it concluded that the challenged statute did not violate the Establishment Clause.

Abington Tp. School District v. Schempp, 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. (2d) 844 (1963) fashioned a test for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion."

It has often been observed that the barrier between government and religion is not easy to locate. The problem is one of degree with neutrality the principal guide and the final command. The search for the answer must be carefully undertaken to the end that the Authority as an agency of the State is not inadvertently forbidden from extending the assistance of the Act to the present and prospective student body of Baptist College at Charleston because of the religious association of its founders.

The third United States Supreme Court decision dealing with government aid to church-related education, is *Board of Education, etc. v. Allen,* 392 U. S. 236, 88 S. Ct. 1923, 20 L. Ed. (2d) 1060, (1968) which involved an Estab-

lishment Clause challenge to a New York statute authorizing the State to loan secular school textbooks to parochial school students. In determining the validity of the challenged statute, the Court utilized the secular purpose and primary effect test under which to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion. Applying this test in *Allen* the Court upheld the statute on the ground that its stated legislative purpose clearly was secular and the primary effect of the loan of secular textbooks could not be said either to advance or inhibit religion. Although the challenged statute in *Allen* authorized aid to parochial school students and their parents, rather than to the schools themselves, the Court neither held nor suggested that the identity of the direct recipient of the aid was the critical factor in determining the constitutionality of the statute under the Establishment Clause. Moreover, the Court held that an indirect-direct aid approach would fashion an unacceptable test based on form rather that substance inasmuch as the contitutional result would depend on minute distinctions and technicalities. The *Allen* case, thus, confirms the secular purpose and primary effect test enunciated in *Schempp* as controlling with respect to the Establishment Clause validity of the Act.

Applying the secular purpose and primary effect test to the Act here in question, I find that it clearly meets the first requirement of a secular legislative purpose. The purpose of the Act appears on its face and has been alluded to above. The Act also meets the second requirement of a primary effect that it neither advances nor inhibits religion. The focus of this test as applied in *Allen* is the function with which the Act is concerned, secular or religious, and not the nature of the institution, secular or religious, which receives the assistance offered by the Act. The Supreme Court has long recognized that church-related educational intsitutions pursue two goals: secular education and religious instruction.

The history of church-related educational institutions in this Country reflects this dual function. Legislative, ju-

dicial, and prevailing social attitudes demonstrate beyond question that church-related educational institutions play a large and vital role in providing secular education. Legislative and judicial determinations have long established that a state's interest in secular education does not require that all children attend publicly operated schools; attendance at church-related schools satisfies state compulsory education laws provided the schools meet state secular education requirements. The Supreme Court summarized in *Allen* from the standpoint of the constitutional standard applied in that case, the relationship of the sectarian function to the secular education function of private schools, including parochial schools:

> "Underlying these cases, and underlying also the legislative judgments that have preceeded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

The Act before me as I construe it makes the projects available to all institutions for higher education without discrimination and without regard to any religious affiliation or identification with any particular denomination or church, but with regard to the secular nature of the project for which aids is sought. It is important that engaging in the program for construction of educational facilities

under the Act is entirely voluntary on all sides. I detect no element of preferential coercive treatment as to eligible institutions or as to those which may finance projects. I hold that the Act has a primary effect that neither advances nor inhibits religion and there is no suggestion that the cause of religion will be served or obstructed by the facilities to be constructed and financed.

It would be ironic indeed if the Legislature in enacting the Act so specifically intended and precisely written to comply with the constitutional standard of a secular legislative purpose and a primary effect that neither advances nor inhibits religion were to be striken down in the name of religious freedom. In short, I find no conflict between preservation of religious freedom and preservation of higher education. Without both, we may end up with neither.

I conclude, therefore, that Plaintiffs claim that the Act and the proposed actions of the Defendants for the construction of academic facilities impair his rights under the Establishment Clause is without merit.

For the reasons above set forth, the relief sought by the Plaintiff must be denied, as the holding of this Court is that the Act is a valid exercise of the legislative power of the General Assembly of South Carolina, and the Defendants constituting the Budget and Control Board and the Defendant Baptist College may proceed with the proposed issuance of revenue bonds pursuant to the Act.

AND IT SO ORDERED,

/s/ CLARENCE E. SINGLETARY
Resident Judge, Ninth Circuit.

Charleston, South Carolina,
May 1st, 1970.

EXCEPTIONS

The Plaintiff excepts to the Decree of Honorable Clarence E. Singletary dated May 1st, 1970 on the following grounds:

1. The Court below erred in holding that the issuance of the bonds pursuant to the Act and for the purpose of refunding outstanding obligations originally incurred by the Baptist College at Charleston serves a public rather than a private purpose, the error assigned being that only a private corporation will benefit from the issuance of the proposed revenue bonds inasmuch no new facilities will be provided.

2. The Court below erred in refusing to hold the Act invalid in that it permits a loan of the credit of the State for the benefit of a private corporation, the error assigned being that the revenue bonds to be issued pursuant to the Act will be sold upon the credit of the State and thus effectually lends the credit of the State to a private corporation.

3. The Court below erred in failing to hold the Act invalid on the grounds that the Act and the action of the Defendants pursuant thereto afford to a special class, *viz.*, those seeking the assistance under the Act, privileges and immunities not available to all classes or persons generally, the error assigned being that the Act and the actions of the Defendants pursuant thereto are in violation of the privileges and immunities provisions of Section 5 of Article I of the South Carolina Constitution.

4. The Court erred in holding that the option to purchase the project as defined in the Act for a nominal consideration and to renew the Lease at nominal rentals does not constitute an unlawful disposition of public property for less than the full market value, the error assigned being that such actions are violative of Section 31 of Article III and Section 5 of Article I of the South Carolina Constitution which forbid a sale of land to a corporation for a less price than that for which it can be sold to individuals and grant to the Baptist College at Charleston privileges and advantages not granted to others.

5. The Court below erred in holding that the proposed issuance of the bonds pursuant to the Act does not violate Section 9 of Article XI of the South Carolina Constitution, the error assigned being that the property and credit of the State of South Carolina is being donated, loaned, contracted, appropriated or otherwise used directly or indirectly in aid or maintenance of the Baptist College at Charleston, which is wholly or in part under the direction or control of a religious organization.

6. The Court below erred in holding that the issuance of the bonds under the Act does not violate Section 4 of Article I of the South Carolina Constitution and the First Amendment of the Federal Constitution, the error assigned being that the Act is legislation respecting an establishment of religion and prohibiting the free exercise thereof when used for the benefit of a sectarian institution as the Baptist College at Charleston.

ADDITIONAL SUSTAINING GROUNDS OF THE BAPTIST COLLEGE AT CHARLESTON

The Defendant Baptist College at Charleston urges as an additional sustaining ground of the Decree of the Lower Court the following:

That His Honor erred in holding that the Defendant Baptist College at Charleston is a College wholly or in part under the direction of control of a church or of a religious or sectarian denomination, society or organization, the error assigned being that the College operated by the Defendant Baptist College at Charleston is a nonsectarian institution of higher learning which has no restrictions upon its enrollment or faculty on the basis of religion and is attended by students of all religions.

AGREEMENT OF COUNSEL

It is agreed that the foregoing when printed shall constitute the Record of Appeal with Exceptions to the Supreme Court of South Carolina and that a copy thereof, signed by counsel, shall be filed with the Clerk of the Supreme Court as a return and that the case may be submitted to the Court without oral argument.

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C. PINCKNEY ROBERTS,
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Attorneys for the Budget and Control Board of South Carolina and the Attorney General of South Carolina.

SINKLER, GIBBS & SIMONS,
Attorneys for the Respondents

THE DECISION IN QUESTION
(Supreme Court of South Carolina)

The opinion of the Supreme Court of South Carolina filed March 2, 1972—South Carolina—, 187 S. E. (2d) 645, from herein is printed in the Jurisdictional Statement in No. 71-1523, pages 17 to 29, both inclusive.

THE STATUTE INVOLVED

Section 25 of Act No. 349 of the Acts of the General Assembly of 1969, the "Educational Facilities Authority Act," is printed in the Jurisdictional Statement in No. 71-1523, pages 33 to 44, both inclusive.

RULES AND REGULATIONS OF THE EDUCATIONAL FACILITIES AUTHORITY

The Rules and Regulations of the Educational facility Authority adopted September 2, 1971, and considered in the Decision in question are printed in the Jurisdictional Statement in No. 71-1523, pages 47 to 52, both inclusive.

STIPULATION AS TO FACTUAL CHANGES IN PROPOSED FINANCING

Stipulation of the parties setting forth the facts as they now exist with respect to the pending application of the Baptist College at Charleston to the State Budget and Control Board of South Carolina for the issuance of not exceeding $3,500,000.00 Education Facilities Authority Revenue Bonds pursuant to Section 25 of Act No. 349 of the 1969 Acts of the South Carolina General Assembly.

This action was instituted by the filing of the Complaint in the Charleston County Court of Common Pleas on March 20, 1970, contesting the constitutionality of the South Carolina Educational Facilities Authority Act (Section 25 of Act No. 349 of the 1969 Acts of the South Carolina General Assembly) and to enjoin the Defendants constituting the Budget and Control Board of the State of South Carolina from issuing bonds pursuant thereto; and, in particular, to enjoin the issuance of not exceeding $3,500,000 of bonds pursuant to the Act for the benefit of the Baptist College at Charleston. It was alleged in the Complaint and admitted by all parties that the proceeds to be derived from the sale of the proposed $3,500,000 bond issue were to be used (a) to refund outstanding indebtedness of the College in the amount of approximately $2,500,000, proceeds of which had been used to construct buildings on the College campus and to purchase equipment and for land improvement; (b) for reimbursing in part the College's Current Fund for monies advanced to the College's Plant Fund and used to purchase school equipment and for other capital improvements; and (c) to repay certain indebtedness of the Baptist College Foundation incurred for the

purpose of acquiring equipment and trailers utilized as a part of the College's educational plant.

Since this litigation was originally instituted, the College has effected on September 28, 1972, a permanent $2,500,000 bank loan, the proceeds of which have been used to fulfill the purposes set forth in (a) and (c) above, secured by a first mortgage upon approximately 30 acres of the College campus, including the following buildings located thereon:

The College does not propose to refund this $2,500,000 bank loan out of the proceeds of bonds issued pursuant to the Act. At the present time the College proposes that the Educational Facilities Authority (the Authority) issue only $1,250,000 of bonds pursuant to the Act, whose proceeds will be used, (i) to repay in full the College's Current Fund for the balance (approximately $250,000) advanced to the College's Plant Fund as aforesaid; (ii) to refund outstanding short-term loans in the amount of $800,000 whose proceeds were to pay off indebtedness incurred for *capital improvements,* and (iii) to finance the completion of the dining hall facilities at a cost of approximately $200,000.

The College will convey a portion of its campus to the Authority, exclusive of the properties now under mortgage to secure the permanent bank loan above described. The property so to be conveyed to the Authority will not include the physical education plant wherein are located facilities used for religious worship. As in the original proposal, the property so conveyed to the State will be leased back to the College at a rental sufficient to pay the bonds and the property so conveyed will be subject to the lien of a Trust Indenture to secure the bondholders.

Inasmuch as the College's original Petition to the Authority sought the issuance of **not exceeding** $3,500,000.00 of bonds pursuant to the Act, and the action of the Authority pursuant to the said Petition gave preliminary approval to the issuance of **not exceeding** $3,500,000.00 bonds pursuant to the Act "subject to the approval by the Authority of the final terms and conditions of the proposed financing and the terms and provisions of the Lease Agree-

ment and Trust Indenture to be used in connection therewith", the College, the Authority and the Appellant agreed that no further application is required at this time, and hat the preliminary approval heretofore given includes the preliminary approval of the issuance of not exceeding $1,250,000 of bonds pursuant to the Act which the College now seeks for the purposes set forth hereinabove.
Dated October 30, 1972.

WE AGREE TO THE FOREGOING:

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ROBERT McC. FIGG, JR.,
Attorneys for the Appellant.

DANIEL R. McLEOD,
HUGER SINKLER,
THEODORE B. GUERARD,
Attorneys for the Appellees.

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No. ———

IN THE

Supreme Court of the United States

RICHARD W. HUNT
Appellant

versus

ROBERT E. McNAIR, *Governor of The State of South Carolina, et al.*

Appellees

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of South Carolina which upheld the constitutionality of the South Carolina Educational Facilities Authority Act (Section 25 of Act No. 349 of the Acts of the South Carolina General Assembly for the year 1969) as applied to and authorizing a proposed transaction between the State of South Carolina and the Baptist College at Charleston; which rejected the contention of Appellant that the said Act as so applied is invalid under the provision in the First Amendment to the Constitution of the United States that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof; and which affirmed the action of the trial court in denying the injunctive relief against said transaction sought by Appellant in this action.

OPINION BELOW

The opinion of the Supreme Court of South Carolina has not yet been reported in the official South Carolina Reports. It is reported in *Hunt v. McNair, Governor,* 187

S. E. 2d 645. The opinion of the Court was filed on March 2, 1972, and became final on March 13, 1972. A copy of the opinion is set forth in Appendix A hereto. Notice of appeal was filed in the Supreme Court of South Carolina on April 3, 1972.

JURISDICTION

This is an action brought in the Court of Common Pleas for Charleston County, South Carolina, under the Uniform Declaratory Judgments Act, being Sections 10-2001 *et seq.* of the Code of Laws of South Carolina, 1962. By his complaint Appellant, a resident and taxpayer of South Carolina whose interests would be adversely affected thereby, sought to enjoin a transaction between the State Budget and Control Board of the State of South Carolina, acting as the State's Educational Facilities Authority and the Baptist College at Charleston, involving issuance and sale of State revenue bonds by the former for the benefit of the latter, proposed to be made under the authority of the South Carolina Educational Facilities Authority Act of 1969. Appellant based his claim for injunctive relief on a number of grounds, which included the ground that, as applied to and authorizing such transaction, the Act was invalid under the First Amendment to the Constitution of the United States as being a law respecting an establishment of religion and prohibiting the free exercise thereof. The decree of the Court of Common Pleas denying the injunctive relief sought by Appellant and holding the Act constitutional was dated May 1, 1970 (R. 39-58).

Appellant appealed therefrom to the Supreme Court of South Carolina, the State's highest Court, on a number of exceptions which included his Exception 6 assigning error in holding that the issuance of the proposed bonds under the Act does not violate the First Amendment to the Constitution of the United States. (R. 60) The decision of the Supreme Court on the appeal filed on October 22, 1970, affirmed the judgment of the Court of Common Pleas, *Hunt v. McNair*, 255 S. C. 71, 177 S. E. 2d 362. Petition for rehearing based upon Appellant's contention under the First

Amendment was denied by the Supreme Court on November 10, 1970.

Appellant appealed to the Supreme Court of the United States from the judgment of the Supreme Court of South Carolina, contending that the Act, as applied to and authorizing the transaction proposed by the Baptist College, contravenes the Establishment and the Exercise Clauses of the First Amendment.

On June 28, 1971, the Supreme Court of the United States entered the following order in this action:

> "The judgment is vacated and the case is remanded to the Supreme Court of South Carolina for reconsideration in light of this Court's decisions in *Lemon, et al, vs. Kurtzman, et al.*, 403 U.S. 602, *Tilton, et al. vs. Richardson, et al.*, 403 U.S. 672, *Earley, et al. vs. DiCenso, et al.*, 403 U.S. 602, and *Robinson et al. vs. DiCenso, et al.*, 403 U. S. 602, decided June 28, 1971. Mr. Justice Black and Mr. Justice Douglas are of the opinion that probable jurisdiction should be noted and the case set for oral argument."
>
> *Hunt vs. McNair*, 403 U. S. 945 (1971).

After the remand, the case was briefed and argued orally by the parties, and upon reconsideration the Supreme Court of South Carolina again affirmed the judgment of the Court of Common Pleas denying the declaratory and injunctive relief sought by appellant.

The jurisdiction of the Supreme Court of the United States to review the judgment appealed from is conferred by Title 28, United States Code, Section 1257 (2), which provides that final judgments rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by appeal where (as here) is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity. The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States: *Tilton v. Richardson, et al.*, 403 U. S. 672 (1971); *Lemon v. Kurtz-*

man, 403 U. S. 602 (1971); *Earley v. DiCenso*, 403 U. S. 602 (1971); *Robinson v. DiCenso*, 403 U. S. 602 (1971); and *Walz v. Tax Commission of the City of New York*, 397 U. S. 664 (1970).

STATUTE INVOLVED

The South Carolina Educational Facilities Authority Act, Section 25 of Act No. 349 of the Acts of the General Assembly of South Carolina for 1969, 56 S. C. Statutes at Large 603, is set forth in Appendix B hereto.

QUESTION PRESENTED

Does the South Carolina Educational Facilities Authority Act, supplemented by the regulations promulgated thereunder, contravene the Religious Clauses of the First Amendment to the Constitution of the United States, as applied to authorize the State to issue, sell and service its tax-free revenue bonds to obtain funds to enable the Baptist College at Charleston to refinance its outstanding indebtedness incurred for the construction of its buildings and facilities and to construct additional facilities?

STATEMENT OF THE CASE

The South Carolina Educational Facilities Authority Act (Appendix B) declares that the benefit of the people of the State, the increase of their commerce, welfare and prosperity, and the improvement of their health and living conditions depend upon the education of the present and future generations of youth; that it is essential that private institutions for higher education in the State be given appropriate additional means of education of such youth; and that this Act has the purpose of affording a measure of assistance to enable private institutions for higher education to provide the facilities and structures which are sorely needed to accomplish such objectives. (Act. Par. A)

The Educational Facilities Authority which the Act creates is composed of the members of the State Budget and

Control Board, a State agency, who are the Governor, the State Treasurer, the State Comptroller General, the Chairman of the Finance Committee of the State Senate, and the Chairman of the Ways and Means Committee of the State House of Representatives, all *ex officio.* (Act. Par. D; S. C. Code of Laws, 1962, Section 1-351 *et seq.*) The Authority is denominated a body politic and corporate and a public instrumentality performing under the Act "an essential public function."

Section D of the Act states that "all the functions and powers of the Authority are hereby granted to the State Budget and Control Board as an incident of its functions in connection with the public finances of the State."

The Baptist College at Charleston is a corporation chartered under the laws of South Carolina "to establish, equip, maintain, conduct, own and operate a Baptist, liberal arts college for educational purposes . . . and to do such acts and carry on the work of a well regulated college . . ." Its Board of Trustees consists of 25 members elected by the South Carolina Baptist Convention, which convention has the power to provide by resolution, and change from time to time, the terms of office of the various members of the board. The charter provides that the Board of Trustees "shall manage the affairs of the Baptist College at Charleston or any agency entrusted to it, in trust for the S. C. Baptist Convention consistent with the charter of the college," and that "The business and financial policy of the South Carolina Baptist Convention shall be strictly adhered to." (R. 13-19)

The subject of this action is a financing arrangement, petitioned for under the Act (R. 19-27) by the Baptist College, whereby the Authority would accept a conveyance of a substantial portion of the campus of the College, would lease the property so conveyed to the College at an agreed rental, and would then issue and sell to the public generally revenue bonds of South Carolina in the amount of $3,500,000.00 payable, principal and interest, from the rent to be received by the Authority under the lease. The pro-

ceeds of the sale of the bonds would be used (a) to pay off outstanding mortgage indebtedness of the Baptist College in an amount more than $2,500,000.00, and (b) to construct additional buildings and facilities for use in its higher education operations. The Act provides that when the bonds and interest are paid in full the Authority would convey title to the project and campus properties to the College free and clear of all liens and encumbrances. (Act. Par. H)

"Project" is defined in the Act *to include* structures available for use as a dormitory, a dining hall, student union, administration building, academic building, library, laboratory, research facility, classroom, athletic facility, health care facility, and maintenance, storage or utility facility, landscaping, site preparation, furniture, and equipment and machinery, and *not to include* "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination."

In assisting institutions for higher education to construct, finance and refinance projects, the Authority is empowered, *inter alia*, to determine the location and character of any project to be financed under the Act; to construct, maintain, manage, operate, lease as lessor or lessee, and regulate the same; to enter into contracts for the management and operation of such project; and to establish rules and regulations for the use of a project or any portion thereof. The Authority is empowered to designate the participating institution for higher education as its agent to do these things. The Authority is also empowered, generally, to fix and revise from time to time rates, rents, fees and charges for the use of a project and for the services furnished or to be furnished by a project or any portion thereof, and to contract with any person, partnership, association or corporation or other body, public or private in respect thereof. [Act. Par. E (e), (g), (h)]

The State of South Carolina would have no liability for the payment of the bonds; they are payable solely out of the rent received by the Authority from the College, as its tenant. Bondholders would be protected by a foreclosable mortgage given by the Authority on the portion of the campus conveyed to it. (Act. Par. E (k); Par. J) In the event of default bondholders would have the right to compel the performance of all duties required by the Act or the trust agreement to be performed by the Authority, including the fixing, charging, and collecting of the rents, fees and charges authorized by the Act or trust agreement. (Act. Par. N)

In the trial court Appellant, after alleging the facts constituting his cause of action, presented his contention under the First Amendment to the Constitution of the United States in paragraph 16, sub-paragraph (b), of his complaint, as follows:

> "(b) The Act violates Article I, Section 4 of the South Carolina Constitution and the First Amendment to the United States Constitution which prohibit the General Assembly from making any law respecting an establishment of religion or prohibiting the free exercise thereof." (R. 11-12)

[Article I, Section 4, of the South Carolina Constitution contains a provision (obviously taken from the First Amendment and in the same language) that "The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..."]

In its opinion filed October 22, 1970, the Supreme Court of South Carolina held:

> "There is no conflict between the preservation of religious freedom and the preservation of higher education under the Educational Facilities Authority Act. Plaintiff's claim that the Act and the proposed actions of the Defendants as relates to academic facilities impair his rights under the Establishment Clause is without merit."

Subsequent to the vacation of this judgment on June

28, 1971, and the remand for reconsideration, the State Budget and Control Board, acting as the Authority, under Paragraph E (a) of the Act, adopted Rules and Regulations on September 2, 1971. The record in this action was enlarged to include these Rules and Regulations by order dated October 12, 1971. They are printed as Appendix C hereto.

The regulations prescribe the form and substance of applications to the Authority by Institutions of Higher Learning for the financing, construction or equipment of the project (as defined in the Act), or for the refunding of outstanding obligations, mortgages or other advances, including the submission of copies of the proposed lease agreement and Trust Indenture.

They also contain provisions relating to the Lease Agreement and the Trust Indenture.

The Lease Agreement is required to include a covenant (enforceable by a proceeding in any court of competent jurisdiction at the instance of the Authority, the Attorney General, or any taxpayer of the State) that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or primarily in connection with any part of the program of a school or department of divinity for any religious denomination.

The Trust Indenture "shall create a foreclosable lien by way of mortgage in favor of the Trustee thereof covering the project site and all equipment or other property to be located thereon," and "shall mortgage the right, title and interest of the Authority in and to the Lease Agreement," including lease rentals, revenues and receipts accruing to the Authority in connection with its ownership of a Project.

The Lease Agreement may contain provisions whereunder, in the event of involuntary judicial sale as a result of any foreclosure of any mortgage or sale pursuant to any order of any court, the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in

fee simple and shall be free of the condition as to religious use which is otherwise applicable to the Institution or any voluntary grantee thereof.

The Trust Indenture may likewise provide that, upon foreclosure of the project mortgage and the sale of the premises to any person other than the Institution, any purchaser other than the Institution shall receive title free and clear of the rights of the Authority and the Institution without conditions restricting the religious use of the premises.

In the opinion filed March 2, 1972 Appellant's contentions based upon the Religious Clauses of the First Amendment were overruled and the trial court's judgment again affirmed.

Undertaking to distinguish the Rhode Island statute in part because "Schools' financial records were subjected to audit by the State," and the Pennsylvania statute because "participating schools were required to maintain prescribed accounting procedures to identify the cost of secular education services; the accounts were subjected to State audit," the Supreme Court observed that surveillance on the part of the State is not necessary under the proposed financing plan; that the State "plays a passive and very limited role ... serving principally as a mere conduit through which institutions may borrow funds;" and that "upon delivery of the bonds the interest of the Authority would, for all practical purposes, cease."

Rejecting the argument that "the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management and administration of the College," the Supreme Court stated that under the Act and the College's proposal "the basic function of the Authority is to see that religion is not promoted on the leased premises, and that fees are charged sufficient to meet the bond payments."

THE QUESTION IS SUBSTANTIAL

Early in the opinions in *Lemon v. Kurtzman* and *Tilton v. Richardson* reference is made to the three main evils or concerns against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity. *Walz v. Tax Commission*, 397 U. S. 664, 668."

Appellant contended in the Supreme Court of South Carolina that the Authority's exercise of its statutory functions in respect to student fee-fixing and fee-revision from time to time to see that the bonds are paid would cause active and continuing involvement of the State in the fiscal affairs of the Baptist College; that removal, under the Authority's regulations, of the restriction against religious use of the project facilities in favor of a purchaser at a foreclosure sale under any mortgage would have the effect of affording financial support of religion; and that sponsorship and support of religion would also be involved in the instant transaction by the refinancing of the Baptist College's outstanding indebtedness incurred to construct its existing educational facilities without separation as to sectarian and secular use and without restriction as to sectarian use.

As to active involvement, this Court in *Lemon v. Kurtzman* stated:

> "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purpose of the institutions which are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. Mr. Justice Harlan, concurring in *Walz, supra*, echoed the classic warning as to 'programs whose very nature is apt to entangle the State in details of administration'. Here we find that both statutes foster an impermissible degree of entanglement."

The Rhode Island and the Pennsylvania statutes both involved State examination and post-auditing of the rec-

ords of the church schools which would create an intimate and continuing relationship between church and state.

The plurality opinion in *Tilton v. Richardson* emphasized that the "one-time, single-purpose" construction grant involved "no continuing financial relationships or dependencies, no annual audits, and no analysis of an institution's expenditures on secular as distinguished from religious activities."

Paragraph E (g) of the South Carolina Act empowers the State Budget and Control Board acting as the Authority "to fix and *revise from time to time* and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project." etc. [Emphasis added]

Paragraph L of the Act provides that the Authority "may fix, revise, charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by each project," etc.

Paragraph N of the Act provides that any holder of revenue bonds issued under the Act or any coupons may enforce and compel the performance of all duties required by this Section or by such resolution or trust agreement to be performed by the Authority * * * including the fixing, charging and collection of the rates, rents, fees and charges herein authorized," etc.

The financial ability of the Baptist College to pay the rent which retires the bonds and coupons necessarily depends upon the receipt from its students of adequate fees and charges for its total educational services. Fees and charges must necessarily be adjusted from time to time (as recognized in Paragraph E (g) referred to above) to reflect, among other factors, the number of students and the current operating costs.

The Board's function in fixing fees and charges is not a one-time act at the time of the making of the loan. The Board must keep informed of the College's financial condition and fiscal needs, by examination and auditing of its fiscal records, in order to discharge its obligation to the

bondholders, which is, as stated by the Supreme Court of South Carolina, "to see that fees are charged sufficient to meet the bond payments."

In addition, the Board's functions and powers are granted to it in the Act "as an incident of its functions in connection with the public finances of the State." (Par. D) The Board, as the core of the State government, is concerned with the credit of the State. The revenue bonds are to be issued as State bonds, and default in their amortization would adversely affect the State's credit standing.

The Supreme Court of South Carolina recognized this practical fact of economic life in *State ex rel Roddey v. Byrnes*, 219 S. C. 485, 507, 66 S. E. 2d 33, 42 (1951) where it observed that "it is not believed that a state in this enlightened day would allow its so-called revenue bonds to go unpaid irrespective of its technical legal liability."

The Board is thus under a strong motivation, both by reason of its duty to the bondholders and its duty to the State, to be at all times concerned with the operations of the College affecting its financial condition.

The Supreme Court of South Carolina in the judgment appealed from found that "there is less potential for experiencing the substantive evils which the religious clauses were intended to protect than in *Tilton*."

Appellant respectfully submits, however, that the finding should have been, under the principles of *Walz v. Tax Commission*, *Lemon v. Kurtzman* and *Tilton v. Richardson*, that the State's inevitable active and continuing involvement in the Baptist College's financial affairs throughout the life of the bond issue causes a conflict between the Act and the Religious Clauses of the First Amendment.

Although the Act and the Regulations contemplate restriction of the use of the project facilities to secular purposes, the Regulations contain provisions, at the Institution's option, whereunder this use restriction could be removed in favor of the purchaser at a judicial sale under the foreclosure of any mortgage, which would include the

mortgage to the Authority and also a mortgage given by the Institution after re-purchase of the facilities by paying the indebtedness. The only purpose of such a removal provision would be to permit the religious use of the facility by the purchaser.

It is true here as it was in *Tilton v. Richardson* that "the unrestricted use of a valuable property is in effect a contribution of some value to a religious body," and that the original governmental assistance will in part have the effect of advancing religion if the facility which results therefrom can be "converted into a chapel or otherwise used to promote religious interests," whether by the recipient of the assistance, or its involuntary grantee who advanced credit upon the value resulting from the lack of restriction against sectarian use, or a third party purchaser of the property for religious use.

The Baptist College's proposed transaction includes the refinancing out of the proposed revenue bond issue of certain outstanding First Mortgage bonds and other indebtedness.

The indebtedness to be thus refunded was incurred in "constructing and acquiring the necessary educational facilities" to implement the Institution's total program of education, sectarian and secular, without separation between such uses and without formal restriction upon religious use of any of the facilities.

It would seem that a State or Federal Grant for the same purpose, without separation or formal restriction, would have the effect of impermissibly advancing religion under the holding in *Tilton v. Richardson.* Appellant contends that the refunding of the Institution's indebtedness incurred for the construction of its existing educational facilities would have a like effect.

It is respectfully submitted that the question presented by this appeal is substantial and that it is of public importance.

Respectfully submitted,

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Counsel for Appellant.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RICHARD W. HUNT, individually and representing all of the taxpayers of the State of South Carolina,
Petitioner,

versus

ROBERT E. McNAIR, Governor of the State of South Carolina, GRADY L. PATTERSON, JR., Treasurer of the State of South Carolina, JOHN H. MILLS, Comptroller General of the State of South Carolina, EDGAR A. BROWN, Chairman of the Senate Finance Committee, ROBERT J. AYCOCK, Chairman of the Ways and Means Committee of the House of Representatives, constituting the Budget and Control Board of the State of South Carolina; DANIEL R. McLEOD, Attorney General of the State of South Carolina, and BAPTIST COLLEGE AT CHARLESTON, an eleemosynary South Carolina corporation, *Respondents.*

CASE NUMBER 19378

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Petitioner, Richard W. Hunt, individually and representing all of the taxpayers of the State of South Carolina, hereby appeals under 28 U.S.C.A., Section 1257(2) to the Supreme Court of the United States from the final Order and Judgment of the Supreme Court of South Carolina, entered March 13, 1972, based upon its opinion filed on March 2, 1972.

T. B. BRYANT, JR.
P. O. Drawer 1265
Orangeburg, S. C. 29115

ROBERT MC. FIGG, JR.
P. O. Box 944
Columbia, S. C. 29202

Orangeburg, South Carolina, April 3, 1972

Service of the within Notice acknowledged April 4, 1972

HUGER SINKLER

Attorney for the Respondents

Appendix A

Opinion of the Supreme Court of South Carolina
Filed March 2, 1972

PER CURIAM: This case was initially decided by the Court of Common Pleas for Charleston County. The order of that court was appealed. This Court heard the same, and by opinion filed on October 22, 1970, affirmed the order of the lower court. See *Hunt v. McNair, et al.*, 255 S. C. 71, 177 S. E. (2d) 362 (1970).

Thereafter an appeal was taken to the Supreme Court of the United States. On June 28, 1971, that Court remanded the case to us for "reconsideration in the light of . . . decisions in *Lemon, et al. v. Kurtzman, et al.*, 403 U. S. 602, *Tilton, et al., v. Richardson, et al.*, 403 U. S. 672, *Earley, et al., v. DiCenso, et al.*, 403 U. S. 602, and *Robinson, et al., v. DiCenso, et al.*, 403 U. S. 602, decided June 28, 1970." All of these cases deal with freedom of religion, the establishment clause and the first amendment to the Constitution of the United States.

By reason of the directive of the Supreme Court of the United States we must now determine in the light of these cases whether the Educational Facilities Authority Act (enacted by the General Assembly of South Carolina in 1969) and its proposed use and application, violates the first amendment to the Constitution of the United States.

Under the provisions of the Educational Facilities Authority Act (herein referred to as the Act), the Budget and Control Board of the State of South Carolina (the Board), acting as the Educational Facilities Authority (the Authority) is authorized to provide financing for institutions of higher learning by its issuance of revenue bonds payable solely out of the revenues derived by the Authority from the particular project or institution for which they are issued. The bonds are secured by a mortgage on the project so financed.

The Act states that it shall not include "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination."

The Act declares the Authority to be a body politic, and declares its purpose to be "to assist institutions for higher education in the construction, financing and refinancing of projects." It empowers the Authority to adopt rules and regulations for the conduct of its affairs.

The defendant, Baptist College at Charleston, a South Carolina eleemosynary corporation (the College) has petitioned the Authority seeking the preliminary approval of the Authority for the issuance of revenue bonds not exceeding $3,500,000 pursuant to the said Act for the purpose of (a) paying off outstanding indebtedness of the Baptist College Foundation incurred for the purposes of acquiring certain equipment and trailers utilized as a part of the College's educational plant (the payment for which the College is responsible) in the amount of approximately $275,000; (b) reimbursing in part the College's Current Fund for moneys advanced to the College's Plant Fund used to purchase school equipment and other capital improvements and for the payment of the aforesaid obligation of the Baptist College Foundation; and (c) refunding an outstanding indebtedness of the College in the amount of approximately $2,500,000 represented by the College's first mortgage serial bonds dated July 1, 1966.

In accordance with the provisions of the Act the College proposes to convey substantially all of its campus to the State of South Carolina at no cost to the State. The Authority would then lease the property so conveyed to the College under a lease agreement by which the College would be obligated to operate and maintain it as an institution of higher learning and to pay to the Authority or a designee, rentals in an amount sufficient to meet the payments of principal and interest as they become due on the proposed revenue bonds. The Authority would issue the revenue bonds and make the proceeds available to the College for the purposes aforesaid and the bonds would be repayable solely from the rentals to be paid by the Baptist College under the lease agreement. The bonds would be further secured by a Trust Indenture (mortgage) between the Authority

and a bank, as trustee, (acting in lieu of the Authority) which would constitute a foreclosable lien on the property conveyed to the State. When the bonds are paid the Authority would deed the property back to the College subject to restrictions as required by the rules set forth hereinafter. The debt is not a debt or obligation of the State.

Excluded from the property to be conveyed by the College to the State is the library which is being financed in part by a loan from the Department of Health, Education and Welfare; a dormitory which is being financed in part by a loan from the Department of Housing and Urban Development; a dormitory which is currently under lease to the College, and the Physical Education Building where facilities which are used for religious worship are located. Excluded also are approximately 50 acres of land forming a part of the College campus.

By petition to the Authority the College has sought to avail itself of the Act. The Authority, by resolution, has given preliminary approval to the financing arrangement. Thereafter, this action was commenced by the plaintiff to enjoin the defendants from further pursuit of the plan.

The overall purpose of the Act is to permit colleges to borrow funds advantageously by using the State's income tax-free basis as relates to the issuance of bonds. Bondholders are not required to pay income tax on dividends or interest from bonds issued by the State; accordingly, a lower rate of interest is available which inures to the benefit of the College. Under the plan the State issues the bonds, but the money goes to the College. The College, and not the State, pays the bonds through rentals paid the Authority or trustee. There is no cost to the State incident to the entire plan of financing.

Pursuant to the power given to the Authority to adopt rules, the Authority has adopted rules as follows:

> "1. Each Lease Agreement must contain a covenant obligating the Institution that neither the leased land, nor the facility located thereon, shall be used for sectarian instruction or as a place of religious worship,

or in connection with any part of the program of a school or department of divinity of any religious denomination.

"2. Each Lease Agreement shall contain a provision permitting the Authority or any agent of the Authority to conduct such inspections as may be necessary to determine whether the leased premises, or any portion thereof, or any facility located thereon, is being used or has been used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity for any religious denomination.

"3. Each Lease Agreement shall contain an appropriately worded provision providing that the covenant referred to in Paragraph 1 above may be enforced at the instance of the Authority, the Attorney General of South Carolina, or any taxpayer of South Carolina by a proceeding in any court of competent jurisdiction, by injunction, *mandamus* or other means.

"4. If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that neither the leased premises, nor any facility thereon, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination. Such condition shall provide that upon any violation thereof, the subject premises shall revert in fee simple to the Authority and to its successors and assigns. The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure

of any mortgage, or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof."

In our previous opinion, *Hunt, supra*, we said: "Having held that neither the credit of the State nor the property of the State is involved, it follows that this constitutional provision [the establishment clause] is not violated. There is no conflict between the preservation of religious freedom and the preservation of higher education under the Educational Facilities Act."

Pursuant to the ruling of the Supreme Court of the United States on June 28, 1971, counsel for plaintiff and defendants have re-argued the case and submitted additional briefs in the light of *Lemon, Tilton, Earley* and *Robinson.*

Plaintiff now submits three questions for the consideration of this Court:

"QUESTION I

"Under the Educational Facilities Authority Act and the proposed transaction thereunder between the Baptist College at Charleston and the State of South Carolina acting through the State Budget and Control Board, is the State impermissibly involved in the Institution's affairs in contravention of the Religion Clauses of the First Amendment?

"QUESTION II

"Does the proposed transaction afford State sponsorship and financial support to the Baptist College at Charleston's total program of sectarian as well as secular purposes in contravention of the Religion Clauses of the First Amendment?

"QUESTION III

"Does the proposed transaction constitute State financial support of the Baptist College at Charleston

in contravention of the Religion Clauses of the First Amendment, insofar as the project facilities may be authorized to be used for religious purposes by a purchaser at a judicial sale under foreclosure of a mortgage given thereon by the Authority or by the Institution itself subsequent to its repurchase thereof?"

The language of the first amendment to the Constitution of the United States and the language of Article 1, Section 4, of the Constitution of South Carolina are, for all intents and purposes, the same. Accordingly, our reasoning is applicable to both constitutional provisions. The establishment clauses are intended to afford protection against sponsorship, financial support and active involvement of the government in religious activity. *Walz v. Tax Commission*, 397 U. S. 64 (1970).

The legislative intent is set forth in the Act as follows:

"To Create an Educational Facilities Authority

"(A) It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good, to the extent and manner provided herein."

We find nothing in the case before us that undermines the State's legislative intent; it is therefore accorded appropriate deference.

Though three questions are posed, there is in actuality only one basic question for our determination: Is the Act legislation respecting an establishment of religion or prohibiting the free exercise thereof in contravention of the establishment clause? We think it is not.

Prior to *Lemon, Tilton, Earley and Robinson*, there were three significant cases decided by the Supreme Court of the United States on the point. In *Everson v. Board of Education*, 330 U. S. 1 (1947), the Court held that a New Jersey statute providing bus transportation for school children attending Catholic schools was in the nature of general welfare legislation, and that the assistance provided was neutral in its relations with groups of religious believers and non-believers, and that the statute had a secular legislative purpose, the effect of which was to neither advance nor inhibit religion.

In *Board of Education v. Allen*, 392 U. S. 236 (1968), the Court upheld the loan of secular books to students attending parochial schools, holding: ". . . this court has long recognized that religious schools pursue two goals, religious instruction and secular education . . . ." In determining the validity of the challenged statute, the Court utilized the secular purpose and primary effect test under which, to withstand the strictures of the establishment clause, there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion. The statute was upheld on the ground that its stated legislative purpose clearly was secular, and the primary effect of the loan of secular textbooks could not be said either to advance or inhibit religion.

In *Abington Tp. School District v. Schempp*, 374 U. S. 203 (1963), the Court fashioned a test for distinguishing between forbidden involvement of the State with religion and those which the establishment clause permits:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative

power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion."

On June 28, 1971, the Supreme Court of the United States decided the four cases referred to hereinabove. In *Earley* and *Robinson*, citizens and taxpayers of Rhode Island brought suit against state officials to enjoin, as repugnant to the religious clauses of the first amendment and the due process clause of the fourteenth amendment, the operation of a Rhode Island statute providing for payment of up to 15% annual salary supplements to teachers of secular subjects in non-public elementary schools.

In *Lemon*, a similar action against State officials was instituted by Pennsylvania residents and taxpayers challenging the constitutionality of a statute which provided for State reimbursement of non-public elementary and secondary schools for costs of teachers' salaries, textbooks and instructional materials in specified secular subjects, but prohibiting reimbursement for any course that contained any subject matter expressing religious teaching or the morals or forms of worship of any sect.

The Court held that both the Rhode Island and Pennsylvania statutes were unconstitutional under the religion clauses of the first amendment, as fostering, by their cumulative impact, excessive entanglement between government and religion. In so holding the Court considered:

> "(1) the religious purpose and operation of church related elementary and secondary schools, (2) the enhancement of the process of religious indoctrination resulting from the impressionable age of the pupils, particularly in elementary schools, (3) the necessity of state surveillance to insure that the teachers, who were subject to control by religious organizations, observed the restrictions as to purely secular instruction, (4) the states' examination of the parochial schools' financial records to determine which expendi-

tures were religious and which were secular, (5) the probable intensification of political divisiveness along religious lines resulting from the annual appropriations required under the statutes, benefiting relatively few religious groups, and (6) the self-perpetuating and self-expanding propensities of the innovative statutory programs."

We think our case easily distinguishable from these three cases. Under the Rhode Island statute, in order to receive the 15% supplement, teachers were required to be employed in a non-public school at which the average per-pupil expenditure on secular education was less than the public school average. Schools' financial records were subjected to audit by the State. The teacher was required to teach only those subjects offered in the public schools, using teaching materials used in the public schools. Upon applying for the salary supplement the teacher was required to agree in writing not to teach a course in religion while receiving salary supplements. Only teachers in Catholic schools applied.

Under the Pennsylvania statute, participating schools were required to maintain prescribed accounting procedures to identify the cost of secular education services; the accounts were subjected to State audit; reimbursement was limited to courses presented in the public school curricula; and textbooks and materials were subjected to approval by the State.

In the light of the cumulative impact of such plans, the Court held:

"A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts

will involve excessive and enduring entanglement between state and church."

In discussing the Pennsylvania statute the Court said:

"As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship."

The surveillance on the part of the State, obviously abhorred by the Court, is not necessary under the proposed financing plan of the college. The Court contemplates execution of a contract which definitely establishes the rights of all parties to the agreement. The State plays a passive and very limited role in the implementation of the Act, serving principally as a mere conduit through which institutions may borrow funds for the purposes of the Act on a tax-free basis. There is in no sense a banking relationship between the Authority and institutions which utilize the Act. The plan of financing is patterned closely after that successfully functioning under the South Carolina Industrial Revenue Bond Act approved by this Court in *Elliott v. McNair*, 250 S. C. 75, 156 S.E. (2d) 421 (1967). The Authority would take title to the property by deed, issue revenue bonds to finance the project, mortgage the project property to a trustee bank, lease the project back to the College, and simultaneously assign all of the Authority's rights under the lease to the trustee in order to provide for the payment of the bonds. The trustee would disburse them on the order of the institution (subject to proper safeguards assuring a proper application of the proceeds to the purpose for which the bonds were issued) so that upon delivery of the bonds the interest of the Authority would, for all practical purposes, cease.

Counsel for plaintiff argues that the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management and administration of the College. We do not so construe the Act. A read-

ing of the Act and the proposal of the College as submitted to the Authority by petition for approval, indicates that the basic function of the Authority is to see that religion is not promoted on the leased premises, and that fees are charged sufficient to meet the bond payments. The decisions recognize that some involvement between church and State is not constitutionally obnoxious. It is a question of degree and each case must be judicially determined on its own facts, taking into consideration all of the relevant factors.

When one considers the character and purpose of the College and the nature of the assistance provided, and the resulting relationship between the government and the College, it necessarily follows that there is less potential for experiencing the substantive evils which the religious clauses were intended to protect than in *Tilton*.

Tilton also related to the establishment clause of the Constitution of the United States, but arose on a different factual basis. Taxpayers and residents of Connecticut challenged the constitutionality of the Higher Educational Facilities Act of 1963, alleging that it violated the first amendment. That Act authorized federal grants to institutions of higher education for construction of academic facilities, *except those to be used for sectarian instruction or worship*, or in connection with the program of a divinity school or department. Under the Act the government would retain only a 20-year interest in the financed facilities, and if a facility should be used other than as a secular academic facility during such period, the United States government would be entitled to recover back a proportionate part of the federal grant. Five members of the Court agreed that the religion clause of the first amendment was not violated by the Act insofar as it authorized grants to church-related colleges for construction of buildings and facilities to be used exclusively for secular educational purposes. Eight members of the Court agreed that the first amendment was violated by the act's provision limiting the government's interest in covered facilities to

a 20-year period. The Court found constitutionally objectionable only the 20-year provision which allowed use of the facilities for sectarian purposes after that period. The Court said:

> "Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. If, at the end of 20 years the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.
>
> "To this extent the Act therefore trespasses on the Religious Clauses. . . ."

We think the facts in *Tilton* are greatly similar to the facts in this case, but the 20-year limitation involved in *Tilton* is absent in the case before us. As pointed out hereinabove, facilities used or to be used for sectarian instruction or as a place of worship are excluded under the Act. In addition, the rules issued by the Authority specifically provide that the properties conveyed, and later re-conveyed, may not be used for sectarian instruction or as a place of worship, and provide that when the property is deeded back to the college the deed shall contain a restriction that the premises and facilities shall not be used for sectarian instruction or a place of worship or in connection with a program of a school of divinity. Accordingly, we find and conclude that the objection sustained in *Tilton* is not present here.

From a study of the whole of the record, including the Act itself, we conclude that the Act is a valid exercise of the legislative power of the General Assembly of South Carolina. It has a secular legislative purpose. It neither

advances nor inhibits religion. There is no fostering of an excessive government entanglement with religion.

We have considered all issues in the light of *Lemon*, *Robinson*, *Earley* and *Tilton*, and conclude that the relief sought by the plaintiff must be denied. The establishment clause of neither the United States Constitution nor the Constitution of South Carolina is violated. The defendants constituting the Budget and Control Board, and the defendant, Baptist College at Charleston, may proceed with the proposed issuance of revenue bonds pursuant to the Act.

The judgment of the lower court is

AFFIRMED.

/s/ JOSEPH R. MOSS *C.J.*
/s/ J. WOODROW LEWIS *A.J.*
/s/ THOS. P. BUSSEY *A.J.*
/s/ J. M. BRAILSFORD *A.J.*
/s/ BRUCE LITTLEJOHN *A.J.*

Appendix B

Section 25 of Act No. 349 of the Acts of The General Assembly of 1969

SECTION 25

To Create an Educational Facilities Authority

(A) It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good, to the extent and manner provided herein.

(B) This section, when codified, may be referred to and cited as the "Educational Facilities Authority Act."

(C) In this section, the following words and terms shall, unless the context otherwise requires, have the following meanings:

(a) "Authority", shall mean the State Budget and Control Board of South Carolina acting as the Educational Facilities Authority.

(b) "Project", shall mean a structure or structures available for use as a dormitory or other housing facility, including housing facilities for student nurses, a dining hall, student union, administration building, academic building, library, laboratory, research facility, classroom, athletic facility, health care facility, and maintenance, storage or utility facility and other structures or facilities related thereto or required or useful for the instruction of students or the conducting of research or the operation of an institution for higher education, including parking and other facilities or structures essential or convenient for the orderly conduct of such institution for higher education,

and shall also include landscaping, site preparation, furniture, equipment and machinery and other similar items necessary or convenient for the operation of a particular facility or structure in the manner for which its use is intended but shall not include such items as books, fuel, supplies or other items the costs of which are customarily deemed to result in a current operating charge, and shall not include any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination.

(c) "Cost", as applied to a project or any portion thereof financed under the provisions of this act embraces all or any part of the cost of construction, acquisition, alteration, enlargement, reconstruction and remodeling of a project including all lands, structures, real or personal property, rights, rights of way, franchises, easements and interest acquired or used for or in connection with a project, the cost of demolishing or removing any buildings or structures on land so acquired, including the cost of acquiring any lands to which such buildings or structures may be moved, the cost of all machinery and equipment, financing charges, interest prior to, during and for a period of not more than two years after completion of such construction and acquisition, provisions for reserves for principal and interest and for extensions, enlargements, additions and improvements, the cost of architectural, engineering, financial and legal services, plans, specifications, studies, surveys, estimates of cost and of revenues, administrative expenses, expenses necessary or incident to determining the feasibility or practicability of constructing the project and such other expenses as may be necessary or incident to the construction and acquisition of the project, the financing of such construction and acquisition and the placing of the project in operation.

(d) "Bonds", or "revenue bonds", shall mean revenue bonds of the authority issued under the provisions of this

section, including revenue refunding bonds, notwithstanding that the same may be secured by mortgage or the full faith and credit of a participating institution for higher education or any other lawfully pledged security of a participating institution for higher education.

(e) "Institution for higher learning", shall mean a nonprofit educational institution within the State authorized by law to provide a program of education beyond the high school level and which does not receive State financial support, but shall not include any state-supported institution.

(f) "Participating institution for higher education", shall mean an institution for higher education which, pursuant to the provisions of this section, undertakes the financing and construction or acquisition of a project or undertakes the refunding or refinancing of obligations or of a mortgage or of advances as provided in this section.

(D) There is hereby created a body politic and corporate to be known as the "Educational Facilities Authority", hereinafter in this section called the authority. The authority is constituted a public instrumentality and the exercise by the authority of the powers conferred by this section shall be deemed and held to be the performance of an essential public function. The authority shall consist of the members from time to time of the State Budget and Control Board, ex officio; and all the functions and powers of the authority are hereby granted to the State Budget and Control Board as an incident of its functions in connection with the public finances of the State.

(E) The purpose of the authority shall be to assist institutions for higher education in the construction, financing and refinancing of projects, and for this purpose the authority is authorized and empowered:

(a) to adopt rules and regulations for the conduct of its affairs and business.

(b) to adopt an official seal and alter the same at pleasure;

(c) to maintain an office at such place or places as it may designate;

(d) to sue and be sued in its own name, plead and be impleaded;

(e) to determine the location and character of any project to be financed under the provisions of this section, and to construct, reconstruct, remodel, maintain, manage, enlarge, alter, add to, repair, operate, lease, as lessee or lessor, and regulate the same, to enter into contracts for any or all of such purposes to enter into contracts for the management and operation of a project, and to designate a participating institution for higher education as its agent to determine the location and character of a project undertaken by such participating institution for higher education under the provisions of this section and as the agent of the authority, to construct, reconstruct, remodel, maintain, manage, enlarge, alter, add to, repair, operate, lease, as lessee or lessor, and regulate the same, and as the agent of the authority, to enter into contracts for any or all of such purposes, including contracts for the management and operation of such project;

(f) to issue bonds, including bond anticipation notes pursuant to Act No. 116 of 1965 and other obligations of the authority for any of the purposes of this section and to fund or refund the same all as provided in this section.

(g) generally, to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project or any portion thereof and to contract with any person, partnership, association or corporation or other body public or private in respect thereof;

(h) to establish rules and regulations for the use of a project or any portion thereof and to designate a participating institution for higher education as its agent to establish rules and regulations for the use of a project undertaken for such participating institution for higher education;

(i) to employ consulting engineers, architects, attorneys, accountants, construction and financial experts, superin-

tendents, managers, and such other employees and agents as may be necessary in its judgment, and to fix their compensation;

(j) to receive and accept from any public agency loans or grants for or in aid of the construction of a project or any portion thereof, and to receive and accept loans, grants, aid or contributions from any source of either money, property, labor or other things of value to be held, used and applied only for the purposes for which such loans, grants, aid and contributions are made;

(k) to mortgage any project and the site thereof for the benefits of the holders of revenue bonds issued to finance such project;

(l) to issue bonds to refund outstanding obligation, mortgages or advances issued, made or given by a participating institution for higher education for the cost of a project;

(m) to charge to and apportion among participating institutions for higher education its administrative costs and expenses incurred in the exercise of the powers and duties conferred by this section;

(n) to do all things necessary or convenient to carry out the purposes of this section.

(F) All expenses incurred in carrying out the provisions of this section shall be payable solely from funds provided under the authority of this section and no liability shall be incurred by the authority hereunder beyond the extent to which moneys shall have been provided under the provisions of this section.

(G) The authority is authorized and empowered directly or by and through a participating institution for higher education, as its agent, to acquire by purchase solely from funds provided under the authority of this section, or by gift or devise, such lands, structures, property, real or personal, rights, rights-of-way, franchises, easements and other interests in lands, including lands lying under water and riparian rights, which are located within the State as it may deem necessary or convenient for the construction or

operation of a project, upon such terms and at such prices as may be considered by it to be reasonable and can be agreed upon between it and the owner thereof, and to take title thereto in the name of the authority or in the name of a participating institution for higher education as its agent.

(H) When the principal of and interest on revenue bonds of the authority issued to finance the cost of a particular project or projects at a participating institution for higher education, including any revenue refunding bonds issued to refund and refinance such revenue bonds, have been fully paid and retired or when adequate provision has been made to fully pay and retire the same, and all other conditions of the trust indenture authorizing the same have been satisfied and the lien of such trust indenture has been released in accordance with the provisions thereof, the authority shall promptly do such things and execute such deeds and conveyances as are necessary and required to convey title to such project or projects to such participating institution for higher education, free and clear of all liens and encumbrances, all to the extent that title to such project or projects shall not, at the time, then be vested in such participating institution for higher education.

(I) (a) In anticipation of the sale of such revenue bonds, the authority may issue bond anticipation notes.

(b) The revenue bonds and notes of every issue shall be payable solely out of revenues of the authority derived from the particular project for which they are issued.

Notwithstanding that revenue bonds and notes may be payable from a special fund, they shall be and be deemed to be, for all purposes, negotiable instruments, subject only to the provisions of the revenue bonds and notes for registration.

(c) The revenue bonds may be issued as serial bonds or as term bonds, or the authority, in its discretion, may issue bonds of both types. The revenue bonds shall be authorized by resolution of the authority and shall bear such date, mature at such time, not exceeding fifty years from their

respective dates, bear interest at such rate, not exceeding eight per cent per annum, payable at such time, be in denominations, be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in lawful money of the United States of America at such place, and be subject to such terms of redemption, as such resolution may provide. The revenue bonds or notes may be sold at public or private sale for such price as the authority shall determine, but which shall not at the time of sale yield more than eight per cent per annum computed according to standard tables of bond values.

(d) Any resolution authorizing any revenue bonds or any issue of revenue bonds may contain provisions, which shall be a part of the contract with the holders of the revenue bonds to be authorized, as to:

(1) pledging all or any part of the revenues of a project including revenues to be derived from a leasing of such project to secure the payment of the revenue bonds issued to defray the cost, or any portion of the cost, of such project; (2) the rentals, fees and other charges to be charged, and the amounts to be raised in each year thereby, and the use and disposition of the revenues; (3) the setting aside of reserves or sinking funds, and the regulation and disposition thereof; (4) limitations on the right of the authority or its agent to restrict and regulate the use of the project; (5) limitations on the purpose to which the proceeds of sale of any issue of revenue bonds then or thereafter to be issued may be applied and pledging such proceeds to secure the payment of the revenue bonds or any issue of the revenue bonds; (6) limitations on the issuance of additional bonds, the terms upon which additional bonds may be issued and secured and the refunding of outstanding bonds; (7) the procedure, if any, by which the terms of any contract with bondholders may be amended or abrogated, the amount of bonds the holders of which must consent thereto, and the manner in which such consent may be given; (8) limitations on the amount of moneys derived from the

project to be expended for operating, administrative or other expenses of the authority; (9) defining the acts or omissions to act which shall constitute a default in the duties of the authority to holders of its obligations and providing the rights and remedies of such holders in the event of a default; and (10) the mortgaging of a project and the site thereof for the purpose of securing the bondholders.

(e) Neither the members of the authority nor any person executing the revenue bonds or notes shall be liable personally on the revenue bonds or notes or be subject to any personal liability or accountability by reason of the issuance thereof.

(J) In the discretion of the authority any revenue bonds issued under the provisions of this section may be secured by a trust agreement by and between the authority and a corporate trustee, which may be any trust company or bank having the powers of a trust company within the State. Such trust agreement or the resolution providing for the issuance of such revenue bonds may pledge or assign the revenues to be received from, or proceeds of any lease of, the project for whose cost, or any part thereof, such revenue bonds are issued and may convey or mortgage such project or any portion thereof. Such trust agreement or resolution providing for the issuance of such revenue bonds may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of laws, including particularly such provisions as have hereinabove been specifically authorized to be included in any resolution of the authority authorizing revenue bonds thereof. Any bank or trust company incorporated under the laws of the State which may act as depository of the proceeds of bonds or of revenues or other moneys may furnish such indemnifying bonds or pledge such securities as may be required by the authority. Any such trust agreement may set forth the rights and remedies of the bondholders and of the trustee and may restrict the individual right of action by bondholders. In ad-

dition to the foregoing, any such trust agreement or resolution may contain such other provisions as the authority may deem reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as a part of the cost of the operation of a project.

(K) Revenue bonds issued under the provisions of this section shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement to the effect that neither the State of South Carolina nor the authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. The issuance of revenue bonds under the provisions of this act shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment.

(L) The authority may fix, revise, charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by each project and may contract with any person, partnership, association or corporation, or other body, public or private, in respect thereof. Such rates, rents, fees and charges shall be fixed and adjusted in respect of the aggregate of rates, rents, fees and charges from such project so as to provide funds sufficient with other revenues, if any, (1) to pay the cost of maintaining, repairing and operating the project and each and every portion thereof, to the extent that the payment of such cost has not otherwise been adequately provided for, (2) to pay the principal of and the interest on

outstanding revenue bonds of the authority issued in respect of such project as the same shall become due and payable and (3) to create and maintain reserves required or provided for in any resolution authorizing, or trust agreement securing, such revenue bonds of the authority. Such rates, rents, fees and charges shall not be subject to supervision or regulation by any department, commission, board, body, bureau or agency of this State other than the authority. A sufficient amount of the revenues derived in respect of a project, except such part of such revenues as may be necessary to pay the cost of maintenance, repair and operation and to provide reserves and for renewals, replacements, extensions, enlargements and improvements as may be provided for in the resolution authorizing the issuance of any revenue bonds of the authority or in the trust agreement securing the same, shall be set aside at such regular intervals as may be provided in such resolution or trust agreement in a sinking or other similar fund which is hereby pledged to, and charged with, the payment of the principal of and the interest on such revenue bonds as the same shall become due, and the redemption price or the purchase price of bonds retired by call or purchase as therein provided. Such pledge shall be valid and binding from the time when the pledge is made; the rates, rents, fees and charges and other revenues or other moneys so pledged and thereafter received by the authority shall immediately be subject to the lien of such pledge without physical delivery thereof or further act, and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the authority, irrespective of whether such parties have notice thereof.

The use and disposition of money to the credit of such sinking or other similar fund shall be subject to the provisions of the resolution authorizing the issuance of such bonds or of such trust agreement. Any such resolution or trust agreement shall provide that such sinking or other similar fund shall be the fund for a particular project at an

institution for higher education from which such funds are derived and for the revenue bonds issued to finance such project and may, additionally, permit and provide for the issuance of revenue bonds having a subordinate lien in respect of the security herein authorized to other revenue bonds of the authority and, in such case, the authority may create separate or other similar funds in respect of such subordinate lien bonds.

(M) All moneys received pursuant to the authority of this section, whether as proceeds from the sale of bonds as revenues, shall be deemed to be trust funds to be held and applied solely as provided in this section. Any officer with whom, or any bank or trust company with which, such moneys shall be deposited shall act as trustees of such moneys and shall hold and apply the same for the purposes hereof, subject to such regulations as this section and the resolution authorizing the bonds of any issue on the trust agreement securing such bonds may provide.

(N) Any holder of revenue bonds issued under the provisions of this section or any of the coupons appertaining thereto, and the trustee under any trust agreement, except to the extent the rights herein given may be restricted by any resolution authorizing the issuance of or any such trust agreement securing, such bonds, may, either at law or in equity, by suit, action, mandamus or other proceedings, protect and enforce any and all rights under the laws of the State or granted hereunder or under such resolution or trust agreement, and may enforce and compel the performance of all duties required by this section or by such resolution or trust agreement to be performed by the authority or by any officer, employee or agent thereof, including the fixing, charging and collecting of the rates, rents, fees and charges herein authorized and required by the provisions of such resolution or trust agreement to be fixed, established and collected.

(O) The exercise of the powers granted by this section will be in all respects for the benefit of the people of this State, for the increase of their commerce, welfare and prosperity, and for the improvement of their health and

living conditions, and as the operation and maintenance of a project by the authority or its agent will constitute the performance of an essential public function, neither the authority nor its agent shall be required to pay any taxes or assessments upon or in respect of a project or any property acquired or used by the authority or its agent under the provisions of this section or upon the income therefrom, and any bonds issued under the provisions of this section, their transfer and the income therefrom, including any profit made on the sale thereof, shall at all times be free from taxation of every kind by the State and by the municipalities and other political subdivisions in the State.

(P) Bonds issued by authority under the provisions of this section are hereby made securities in which all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them.

(Q) The authority shall keep an accurate account of all its activities and of all its receipts and expenditures and shall annually in the month of January make a report thereof to its members, to the Governor and to the State Auditor, such reports to be in a form prescribed by the members, with the written approval of the auditor.

(R) The foregoing subsections of this section shall be deemed to provide a complete, additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws; *provided*, the issuance of revenue bonds and revenue refunding bonds under the provisions of this section need not comply with the requirements of any other law applicable to the issuance of bonds. Except as otherwise expressly provided in this section none of the powers granted to the authority under the provisions of this section shall be subject to the supervision or regulation or require the approval or consent of any municipality or political subdivision or any department, division, commission, board, body, bureau, official or agency thereof or of the State.

Appendix C

Rules and Regulations of the Educational Facilities Authority Adopted September 2, 1971

RESOLUTION

WHEREAS, there was created by Section 25 of Part II of Act 349 of the Acts of the General Assembly of the State of South Carolina for the year 1969 (the Act) the Educational Facilities Authority (the Authority), and

WHEREAS, the Authority is by the Act empowered to assist Institutions for Higher Learning as therein defined, and

WHEREAS, by the terms and provisions of the Act the Authority was authorized and empowered to establish rules and regulations for the conduct of its affairs and for the use of any Project or portion thereof, as the term Project is defined in the Act, and

WHEREAS, pursuant thereto the Authority has determined to promulgate rules and regulations in order to both facilitate the functioning of the Act and to insure the observance of the condition imposed by the Act that any Project undertaken pursuant to the Act shall not be used for sectarian instruction or as a place of religious worship and that no part of the proceeds of any Bonds shall be applied to any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity of any religious denomination,

NOW, THEREFORE, BE IT RESOLVED BY THE AUTHORITY IN MEETING DULY ASSEMBLED:

DEFINITIONS

1. All terms defined in the Act used herein shall have the meanings prescribed therefor by the Act.

APPLICATIONS OF INSTITUTIONS OF HIGHER LEARNING

1. All applications to the Authority by Institutions for Higher Learning for the financing, construction or equipment of a Project, or for the refunding of outstanding obligations, mortgages or other advances, shall be made in

writing and shall be accompanied by a certified copy of a resolution showing that the application was authorized by the Board of Trustees or other governing body of the Institution.

2. Each application shall set forth the purposes to which the proceeds of the bonds are to be applied.

3. Each application shall show whether the Institution has engaged the services of an underwriter who will market the bonds for the Institution, or whether it wishes the Authority to effect the sale of the bonds at public sale.

4. Each application shall set forth a properly worded description of the tract of land upon which the Project or Projects will be constructed.

5. Each application shall show existing liens, if any, on the Project site.

6. Each application shall have attached a copy of the proposed Lease Agreement to be made between the Institution and the Authority (or a summary of the terms thereof), and a copy of the proposed Trust Indenture (or a summary of the terms thereof) to be executed between the Authority and a trustee bank, and the form of the Assignment of the rights of the Authority under the Lease Agreement to the Indenture Trustee.

7. Each application shall be accompanied by an undertaking on the part of the Institution, obligating itself to pay all costs and expenses incurred by the Authority in connection with its processing of the application and the sale and issuance of the bonds. It may provide that if bonds are sold, such expense will be paid from the proceeds of such bonds.

8. Each application shall establish to the satisfaction of the Authority that the undertaking sought by the applicant is feasible and that adequate provision will be made for the payment of the principal and interest of the bonds sought to be issued, as and when the same become due and payable.

LEASE AGREEMENTS

1. Each Lease Agreement must contain a covenant obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination.

2. Each Lease Agreement shall contain a provision permitting the Authority or any agent of the Authority to conduct such inspections as may be necessary to determine whether the leased premises, or any portion thereof, or any facility located thereon, is being used or has been used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity for any religious denomination.

3. Each Lease Agreement shall contain an appropriately worded provision providing that the covenant referred to in Paragraph 1 above may be enforced at the instance of the Authority, the Attorney General of South Carolina, or any taxpayer of South Carolina by a proceeding in any court of competent jurisdiction, by injunction, mandamus or other means.

4. If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination. The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure of any mortgage, or sale pursuant to any order

of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof.

TRUST INDENTURE

1. The Trust Indenture shall create a forecloseable lien by way of mortgage in favor of the Trustee thereof covering the project site and all equipment or other property to be located thereon, acquired with the proceeds of the Bonds.

2. The Trust Indenture shall mortgage the right, title and interest of the Authority in and to the Lease Agreement.

3. The Trust Indenture shall mortgage all lease rentals, revenues and receipts arising out of or in connection with the ownership of the Project, with such exceptions as may be approved by the Authority.

4. The Trust Indenture may likewise contain such provisions, covenants, rights and remedies as are customarily found in such documents. It may provide that upon the foreclosure of the mortgage and the sale of the premises to any person other than the Institution, any purchaser at any judicial sale resulting from such foreclosure, other than the Institution, shall receive title to the premises free and clear of the rights of the Authority and the Institution, in fee simple, and without conditions restricting the use of the premises.

SALE OF BONDS

1. Unless the Institution making application for a sale of bonds pursuant to the Act shall set forth in its application that it has engaged the services of an underwriter and has elected to have the underwriter dispose of the bonds at private sale or placement, all bonds issued pursuant to the Act which are sold by the Authority shall be sold at public sale after such advertisement as the Authority shall prescribe.

RECORD OF PROCEEDINGS

1. No bonds shall be delivered until a record of the proceedings incident to the issuance of the bonds and a copy (executed where possible) of the Lease Agreement, the Assignment and the Trust Indenture, have been filed in the office of the Secretary of State of South Carolina.

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

I, P. C. SMITH, Auditor of the State of South Carolina, and Secretary to the State Budget and Control Board, and as such Secretary to Educational Facilities Authority, DO HEREBY CERTIFY:

That the said State Budget and Control Board is composed of the following:

His Excellency, John C. West, Governor of South Carolina and Chairman of the Board;

The Honorable Grady Leslie Patterson, Jr., State Treasurer;

The Honorable John Henry Mills, Comptroller General of South Carolina;

The Honorable Edgar A. Brown, Chairman of the Senate Finance Committee; and

The Honorable Robert James Aycock, Chairman of the House Ways and Means Committee.

That due notice of meeting of said Board, called to be held at the office of the Governor, in the Capital Building, at Columbia, South Carolina, at 3 P.M., Thursday, Sept. 2, 1971, was given to all members in writing, and at least four (4) days prior to said meeting; that all members of said Board were present at said meeting, with the exception of:

None

That at said meeting, a resolution, of which the attached is a true, correct and verbatim copy, was introduced by

Mr. Patterson, who moved its adoption; said motion was seconded by Mr. Mills, and upon the vote being taken and recorded it appeared that the following votes were cast:

FOR MOTION	AGAINST MOTION
5	0

The Chairman thereupon declared the Resolution unanimously adopted, and the original thereof has been duly entered in the permanent records of minutes of meetings of said Board, in my custody as its Secretary.
Sept. 9, 1971.

P. C. Smith,
Secretary

COPY

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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1523

RICHARD W. HUNT, ... *Appellant*

vs.

ROBERT E. McNAIR, Governor of the State of South Carolina, et al., ... *Appellees*

On Appeal from the Supreme Court of South Carolina

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEES

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IN THE

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OCTOBER TERM 1971

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On Appeal from the Supreme Court of South Carolina

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEES

Pursuant to Rule 16 of the Rules of this Court, the Appellees move the Court to dismiss the appeal herein on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument or, in the alternative, to affirm the judgment below on the ground that the questions upon which review is sought have been rendered so unsubstantial by the decision of the Supreme Court of South Carolina that no further review by this Court is necessary.

I.

The State Statute Involved and the Nature of the Case

A. The Statute

This appeal raises the question of the constitutionality of the South Carolina Educational Facilities Authority Act, Section 25 of Act No. 349 of the Acts of the General Assembly of South Carolina for 1969, 56 S.C. Statutes at Large 603, (the Act), as implemented by the Rules and Regulations promulgated thereunder.

The Act declares, among other things, that it is essential that private institutions for higher education in the State be given appropriate additional means for the education of the youth of the State, further, the purpose of the Act is to afford a measure of assistance to enable private institutions for higher education to provide the facilities and structures which are sorely needed to accomplish the various objectives set out in the Act (Act Par. A). As the instrument for accomplishing this purpose, the Act created the South Carolina Educational Facilities Authority, (the Authority), consisting of the members from time to time of the State Budget and Control Board, *ex officio*, and all functions and powers of authority are granted to the State Budget and Control Board as an incident of its functions in connection with the public finances of the State. (Act Par. D). The Authority is to operate on a self-sustaining basis by selling revenue bonds which shall be payable solely out of revenues of the Authority derived from the particular project for which the bonds are issued, and which shall be bound to and operated by a private institution of higher learning.*

On February 2, 1971, the Authority under paragraph E(a) of the Act adopted Rules and Regulations, and the record in

this action was enlarged by Order dated October 12, 1971 to include the Rules and Regulations which appear as Appendix C in Appellant's Jurisdictional Statement. The Rules and Regulations include a requirement that every lease entered into by the Authority under the Act shall contain a covenant enforceable by a proceeding in any court of competent jurisdiction at the instance of the Authority, the Attorney General or any taxpayer of the State, that neither the leased land or any facilities located thereon shall be used for sectarian instruction or as a place of religious worship or in connection with any part of the program of a school or department of divinity for any religious denomination. The Rules and Regulations also provide that if a lease agreement contains a provision permitting the institution to repurchase the facilities upon payment of the bonds, the deed of reconveyance from the Authority shall be made subject to the condition that no facility on the leased premises financed in whole or in part with the proceeds of the bonds shall be used for sectarian instruction or as a place of religious worship or used in connection with any part of the program of a school or department of divinity of any religious denomination, provided that this condition may provide at the option of the institution that if the leased premises shall become the subject of an involuntary judicial sale as a result of any foreclosure of any mortgage or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale (other than the institution) shall be in fee simple, free of the said condition applicable to the institution or any voluntary grantee thereof.

B. The Proceedings Below

This action was instituted in the Charleston County Court of Common Pleas wherein the Plaintiff, a taxpayer of the State of South Carolina and a resident of Charleston County,

filed his complaint on March 20, 1970 for the purpose of (a) contesting the constitutionality of the Act, and (b) in the event the Act shall be held constitutional, prohibiting its use for the benefit of appellee, Baptist College at Charleston and any other institution of higher learning in whole or in part under the direction or control of any church or church-related organization.

The Baptist College has applied to the Authority for the issuance of revenue bonds pursuant to the Act in an amount not exceeding $3.5 million for various purposes including refunding an outstanding indebtedness of the College in the amount of $2.5 million. In accordance with the provisions of the Act, the College proposes to convey substantially all of its campus (not including any portion used for religious purposes) to the State of South Carolina at no cost to the State, the Authority leasing the said property back to the College by lease agreement whereby the College will be obligated to operate and maintain the leased property as an institution of higher learning, and to pay the Authority rentals in an amount sufficient to meet the payments of principal and interest as they become due on the proposed revenue bonds, which bonds would be further secured by a trust indenture between the Authority and a bank, which indenture would constitute a foreclosable lien on the property conveyed to the State. Preliminary approval of this financing arrangement has been granted by the Authority, and the Plaintiff seeks to enjoin any further action by the Defendants pursuant to the Act on the grounds, *inter alia*, that the Act, in providing for aid for all colleges, including private, church affiliated colleges, violates the provisions of Article I, Section 4 of the South Carolina Constitution which prohibits the South Carolina General Assembly from making any law respecting an establishment of a religion or prohibiting the free exercise thereof, and

the First Amendment to the United States Constitution as made applicable to the States by the Fourteenth Amendment.

The Defendants filed answers generally contending that the Act is constitutional and that the proposed actions of the Authority for the benefit of the Baptist College violate no constitutional provisions. After hearing arguments of counsel and on the basis of the pleadings, the Circuit Court handed down its decree dated May 1, 1970 wherein the constitutionality of the Act was sustained, and likewise the proposed action of the Authority thereunder for the benefit of the Baptist College. The Supreme Court of South Carolina in a unanimous opinion affirmed 255 S.C. 71, 177 S.E. 2d 362 (1970).

The Judgment of the Supreme Court of South Carolina was appealed by the Appellant to the Supreme Court of the United States wherein Appellant contended that the Act contravenes the Establishment and the Free Exercise Clauses of the First Amendment as applied to the financing arrangement to be effected by the Authority at the instance of the Baptist College.

On June 28, 1971, the Supreme Court of the United States entered the following order in this action:

> "The judgment is vacated and the case is remanded to the Supreme Court of South Carolina for reconsideration in light of this Court's decisions in *Lemon, et al, vs. Kurtzman, et al.*, 403 U.S. 602, *Tilton, et al. vs. Richardson, et al.*, 403 U.S. 672, *Earley, et al. vs. DiCenso, et al.*, 403 U.S. 602, and *Robinson et al. vs. DiCenso, et al.*, 403 U.S. 602, decided June 28, 1971. Mr. Justice Black and Mr. Justice Douglas are of the opinion that probable jurisdiction should be noted and the case set for oral argument."

Hunt vs. McNair, 403 U.S. 945 (1971).

Pursuant to the remand the parties filed briefs with and argued orally before the Supreme Court of South Carolina which again, in an opinion filed on March 2, 1972, affirmed the judgment of the lower court denying the relief sought by the Appellant. An appeal from this decision has been filed in this Court, and the within motion is directed at such appeal.

II.

ARGUMENT

The Case Does Not Present a Substantial Question

Appellees respectfully submit that the question as presented in the Jurisdictional Statement at page 4 thereof is not in keeping with Rule 15.1(c) of this Court which requires that the same be short and concise, for the question as presented is wordy, all encompassing, argumentative and inclusive of a subsidiary question set forth therein. In any event, such subsidiary question, *viz.*, the ability of the Baptist College to refinance, out of the proceeds of the proposed bonds, outstanding bonded indebtedness incurred by the College for the construction of buildings and facilities, is a matter which rests in the absolute discretion of the State of South Carolina as a matter of State interest only. Appellee finds no jurisdictional basis whatsoever for the consideration by this Court of such subsidiary question.

As to the principal question, Appellees submit that this case is not one which involves outright aid to a church-related institution. As pointed out above, the Act provides a needed financing service to all institutions of higher education, public or private.

It has been the position of Appellees throughout this litigation that the State may expend its funds in a manner which benefits sectarian institutions as an incident to the benefit conferred on society generally.

In *Cochran, et al v. Louisiana State Board of Education*, 281 U.S. 370 (1930), this Court had before it for consideration the question of the validity of a Louisiana statute providing free school books to school children, the contention being that such purpose was the taking of private property for private purposes. The Court observed that the children who were to utilize the books attended some school, public or private, the latter sectarian or non-sectarian, and that the books were to be furnished them for their use free of costs no matter what school they might attend. The Court further observed that the statute contemplated that the same books that are furnished children attending public schools shall be furnished children attending private schools. In upholding the statute, this Court made the following statement: "Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

Similarly, in *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court held that the State of New Jersey could reimburse parents for the cost of their children's bus transportation to schools, including sectarian schools, even though, as the court recognized, such aid helped children attend church schools and made it possible for some to attend who otherwise might not. Moreover, in *Board of Education v. Allen*, 392 U.S. 236 (1968), this Court held that a State could lend secular textbooks to children in parochial schools free of charge even though free textbooks might make it more likely that some children would attend a sectarian school who otherwise would

not, and ". . . relieve those churches of an enormous aggregate cost for those books." It is interesting also to observe that a State may provide a sectarian institution with general services such as police and fire protection even though such services are paid for out of a real property tax levy and the property of the sectarian institution is exempt from taxation. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

This case is clearly distinguishable from the decisions of the Supreme Court of the United States decided June 28, 1971, and set forth in the order remanding this case to the Supreme Court of South Carolina, of *Lemon, et al vs. Kurtzman*, 403 U.S. 602; *Earley, et al vs. DiCenso, et al*, 403 U.S. 602; *Robinson, et al vs. DiCenso, et al*, 403 U.S. 602. The *Lemon* case involved the payment of funds to cover the cost of teachers' salaries, text books and instructional materials directly to sectarian secondary schools, and the *DiCenso* cases involved the use of state funds to supplement the salaries of teachers in church operated elementary schools. In those cases the United States Supreme Court found that the continuing state involvement and surveilance fostered excessive entanglement between the government and religion. In this case, on the other hand, there is no such involvement and surveilance on the part of the state under the proposed financing plan of the Baptist College. The opinion of the South Carolina Supreme Court points out the true role of the State as "a passive and very limited role in the implementation of the Act serving principally as a mere conduit through which institutions may borrow funds for the purposes of the Act on a tax free basis." Hunt v. McNair, ___ S.C. ___, 187 S.E. 2d 645 (1972) Thus, the financing plan now before the Court comes within the type of state aid sustained in *Tilton, et al vs. Richardson, et al*, 403 U.S. 672, where the United

States Supreme Court sustained federal grants to sectarian institutions for the purpose of financing neutral non-sectarian facilities and, in fact, as stated by the South Carolina Supreme Court, in this case there is "less potential for experiencing the substantive evils" against which the religious clauses were intended to protect.

Thus, *Everson*, *Allen* and *Tilton* govern the decision on the issue presented here and render the question presented so unsubstantial that any further consideration by this Court is unnecessary.

III.

CONCLUSION

Appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellees respectfully move the Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of South Carolina.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 71-1523

RICHARD W. HUNT, APPELLANT,

versus

ROBERT E. McNAIR, GOVERNOR OF THE STATE OF SOUTH CAROLINA, ET AL., APPELLEES

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF APPELLANT

OPINION BELOW

The opinion of the Supreme Court of South Carolina has not yet been reported in the official South Carolina Reports. It is reported in *Hunt v. McNair, Governor, et al.*, 187 S. E. (2d) 645. A copy of the opinion is printed in Appendix A to the Jurisdictional Statement in No. 71-1523 at pages 17 to 29, both inclusive.

JURISDICTION

Appellant appeals from the judgment of the Supreme Court of South Carolina which upheld the constitutionality of the South Carolina Educational Facilities Authority Act (Section 25 of Act No. 349 of the Acts of the South Carolina General Assembly for the year 1969) as applied to and authorizing a proposed transaction between the State of South Carolina and the Baptist College at Charleston; which rejected the contention of Appellant that the said Act as so applied is invalid under the provision in the First Amendment to the Constitution of the United States that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof; and which affirmed the action of the trial court in denying the injunctive relief against said transaction sought by Appellant in this action.

The opinion of the Supreme Court of South Carolina was filed March 2, 1972, and the judgment thereon became final on March 13, 1972.

Notice of appeal therefrom was filed in the Supreme Court of South Carolina on April 3, 1972.

The jurisdiction of the Supreme Court of the United States to review the judgment appealed from is conferred by Title 28, United States Code, Section 1257 (2), which provides that final judgment rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by appeal where (as here) is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity. The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States: *Tilton v. Richardson, et al.*, 403 U. S. 672 (1971); *Lemon v. Kurtzman*, 403 U. S. 602 (1971); *Earley v. DiCenso*, 403 U. S.

602 (1971); *Robinson v. DiCenso*, 403 U. S. 602 (1971); and *Walz v. Tax Commission of the City of New York*, 397 U. S. 664 (1970); *Hunt v. McNair, Governor*, 403 U. S. 945 (1971).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

2. Section 25 of Act No. 349 of the Acts of the General Assembly of South Carolina of 1969 (printed in Appendix B to the Jurisdiction Statement in No. 71-1523 at pages 33 to 44, both inclusive):

"(D) There is hereby created a body politic and corporate to be known as the "Educational Facilities Authority", hereinafter in this section called the authority. The authority is constituted a public instrumentality and the exercise by the authority of the powers conferred by this section shall be deemed and held to be the performance of an essential public function. The authority shall consist of the members from time to time of the State Budget and Control Board, ex officio; and all the functions and powers of the authority are hereby granted to the State Budget and Control Board as an incident of its functions in connection with the public finances of the State.

"(E) The purpose of the authority shall be to assist institutions for higher education in the construction, financing and refinancing of projects, and for this purpose the authority is authorized and empowered:

* * *

(f) to issue bonds, including bond anticipation notes pursuant to Act No. 116 of 1965 and other obligations of the authority for any of the

purposes of this section and to fund or refund the same all as provided in this section.

(g) generally, to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project or any portion thereof and to contract with any person, partnership, association or corporation or other body public or private in respect thereof;

(h) to establish rules and regulations for the use of a project or any portion thereof and to designate a participating institution for higher education as its agent to establish rules and regulations for the use of a project undertaken for such participating institution for higher education;

* * *

(l) to issue bonds to refund outstanding obligation, mortgages or advances issued, made or given by a participating institution for higher education for the cost of a project;

* * *

"(L) The authority may fix, revise, charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by each project and may contract with any person, partnership, association or corporation, or other body, public or private, in respect thereof. Such rates, rents, fees and charges shall be fixed and adjusted in respect of the aggregate of rates, rents, fees and charges from such project so as to provide funds sufficient with other revenues; if any, (1) to pay the cost of maintaining, repairing and operating the project and each and every portion thereof, to the extent that the payment of such cost has not otherwise been adequately provided for, (2) to pay the principal of and the interest on outstanding revenue bonds of the authority issued in respect of such project as the same shall become due and payable and (3) to create and maintain reserves required or provided for in any resolu-

tion authorizing, or trust agreement securing, such revenue bonds of the authority. Such rates, rents, fees and charges shall not be subject to supervision or regulation by any department, commission, board, body, bureau or agency of this State other than the authority. • • •

"(N) Any holder of revenue bonds issued under the provisions of this section or any of the coupons appertaining thereto, and the trustee under any trust agreement, except to the extent the rights herein given may be restricted by any resolution authorizing the issuance of or any such trust agreement securing, such bonds, may, either at law or in equity, by suit, action, mandamus or other proceedings, protect and enforce any and all rights under the laws of the State or granted hereunder or under such resolution or trust agreement, and may enforce and compel the performance of all duties required by this section or by such resolution or trust agreement to be performed by the authority or by any officer, employee or agent thereof, including the fixing, charging and collecting of the rates, rents, fees and charges herein authorized and required by the provisions of such resolution or trust agreement to be fixed, established and collected."

3. Rules and Regulations of the Educational Facilities Authority (printed in Appendix C to the Jurisdictional Statement in No. 71-1523 at pages 47 to 52, both inclusive):

• • •

LEASE AGREEMENTS

• • •

"4. If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institu-

tion, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination. The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure of any mortgage, or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof."

TRUST INDENTURE

• • •

"4. The Trust Indenture may likewise contain such provisions, covenants, rights and remedies as are customarily found in such documents. It may provide that upon the foreclosure of the mortgage and the sale of the premises to any person other than the Institution, any purchaser at any judicial sale resulting from such foreclosure, other than the Institution, shall receive title to the premises free and clear of the rights of the Authority and the Institution, in fee simple, and without conditions restricting the use of the premises."

4. Section 1-351, Code of Laws of South Carolina (1962):

"The State Budget and Control Board shall be comprised of the Governor, ex officio, who shall be chairman, the State Treasurer, ex officio, the Comptroller General, ex officio, and the chairman of the Senate Finance Committee, ex officio, and the chairman of the Ways and Means Committee of the House of Representatives, ex officio."

QUESTIONS PRESENTED FOR REVIEW

I

Will impermissible State involvement in the affairs of the Baptist College at Charleston under the Religion Clauses of the First Amendment necessarily result from the issuance of the State's revenue bonds for it under the South Carolina Educational Facilities Act, in view of the provisions of the Act which empower the State Budget and Control Board, in seeing that the bonds are paid, to fix and revise from time to time fees and charges for the use of and the services furnished by the College's facilities financed thereby, and to regulate the operation thereof?

II

Are the provisions in the State Budget and Control Board's regulations which permit the removal of the restriction against religious use of the financed facilities in case of judicial sale thereof under mortgage foreclosure invalid in the transaction with the Baptist College at Charleston because religion would be advanced in such a case in contravention of the Religion Clauses of the First Amendment?

STATEMENT OF THE CASE

The subject of this action is a financial arrangement, petitioned for by the Baptist College at Charleston, an institution of higher learning which was found by the trial court and the Supreme Court of South Carolina to be operated at least in part under the direction and control of the South Carolina Baptist Convention. (A., 16, 39.) Under this arrangement, the College would convey a portion of its campus to the State Budget and Control Board, acting as the Educational Facilities Authority under South Carolina legislation enacted in 1969 (Section 25, Act No.

349); the Board in turn would lease the property to the College at an agreed rental; and the Board would then issue and sell to the public general revenue bonds of the State payable, principal and interest, from the rent to be received by the Board under the lease. (A., 18, 49.)

The original proposal called for a bond issue of $3,500,000.00, the proceeds to be used in part to pay off outstanding mortgage indebtedness of the College in an amount of approximately $2,500,000.00. By stipulation of the parties it is shown that on September 28, 1972, the College paid off this indebtedness by a permanent loan otherwise arranged, and that its application to the Board has been amended to request the issuance thereunder of $1,250,000.00, the proceeds of which will be used (i) to repay the College's Current Fund for approximately $250,000.00 advanced to the College's Plant Fund to purchase school equipment and for other capital improvements, (ii) to refund $800,000.00 in short term loans whose proceeds were expended for capital improvements, and (iii) to complete dining hall facilities at a cost of approximately $200,000.00. (A., 48-50.)

The Supreme Court of South Carolina in the opinion under appeal construes the Educational Facilities Authority Act as indicating that "the basic function of the Authority is to see that religion is not promoted on the leased premises, and that fees are charged sufficient to meet the bond payments." (Jurisdictional Statement, 26-27.)

To enable the State Budget and Control Board acting as the Authority to discharge its "basic function" of seeing "that fees are charged sufficient to meet the bond payments," the Board is empowered by the Act "to fix and revise from time to time and charge and collect * * * fees and charges for the use of and for the services furnished" by the project. (Par. E(g); Par. L; Jurisdictional Statement, 36, 41.)

The Act provides that any holder of revenue bonds or coupons issued under the Act may by suit enforce and compel the performance of all duties required by the Act or any resolution or trust agreement to be performed by the Board acting as the Authority, "* * * including the fixing, charging and collecting of the rates, rents, fees and charges herein authorized," etc. (Par. N, Jurisdictional Statement, 43.)

The appellant brought the instant action to challenge the validity of the Act as authorizing the proposed financing arrangement between the State and the Baptist College, upon the ground, among others, that, as so construed and applied, its implementation would contravene the Religion Clauses in the First Amendment to the United States Constitution. (A., 10.) The judgment of the trial court overruling the Appellant's challenge and denying the injunctive relief sought was affirmed by the Supreme Court of South Carolina. *Hunt v. McNair, Governor,* 255 S. C. 71, 177 S. E. (2d) 362 (1970).

On appeal therefrom, the judgment of the Supreme Court of South Carolina was vacated, *Hunt v. McNair, Governor,* 403 U. S. 945 (1971), and the case was remanded for reconsideration in the light of the decisions in *Lemon, et al. v. Kurtzman, et al.,* 403 U. S. 602; *Tilton, et al. v. Richardson, et al.,* 403 U. S. 672; *Earley, et al. v. DiCenso, et al.,* 403 U. S. 602; and *Robinson, et al. v. DiCenso,* 403 U. S. 602.

Prior to such reconsideration, the State Budget and Control Board, acting as the Educational Facilities Authority, promulgated rules and regulations as authorized by the Act, which prescribe the form and substance of applications by institutions of higher education to the Authority, including the proposed lease agreement and trust indenture to be submitted therewith. (A., 48, Jurisdictional Statement, 47-50.)

While the rules and regulations so promulgated provide in substance for a covenant in the lease that no facility financed under the Act shall be used for sectarian instruction or as a place of worship, or in connection with any part of the program of a school or department of divinity of any religious denomination, they further provide that the lease and trust indenture may, at the institution's option, contain a provision that the conditions restricting the use of the premises, in the event of foreclosure of any mortgage given in the financing transaction or by the institution after reconveyance to it, shall be eliminated in the case of any purchaser at a judicial sale thereunder. (Jurisdictional Statement, 49, 50.)

Upon reconsideration, the Supreme Court of South Carolina filed its opinion on March 2, 1970, in which the Appellant's challenge to the Act, and to the portion of the rules and regulations providing for the elimination of the restriction against sectarian use in favor of any purchaser at a judicial sale, was overruled and the trial court's judgment again affirmed. (Jurisdictional Statement, 17-29.)

The judgment thereon became final on March 13, 1972; notice of appeal therefrom was filed in the Supreme Court of South Carolina on April 3, 1972; and probable jurisdiction was noted on October 16, 1972.

SUMMARY OF ARGUMENT

Unlike the situation in *Tilton v. Richardson,* which involved a "one-time" transaction between the government and a church-related institution of higher learning, the South Carolina Educational Facilities Authority Act necessarily implies and provides for a continuing relationship between the State and a church-related institution of higher learning for which it issues and sells revenue bonds.

It is a basic function of the State Budget and Control Board under the Act to see that fees are charged by the

College sufficient to meet the bond payment, and to that end to fix and to revise from time to time the fees and charges to be charged its students by the College. In order to do this it is irresistibly implied that the Board keep itself informed of the financial condition and fiscal operations of the College by reports, audits and the like.

The necessary result of the Board's discharge of its function in respect to payment of the bonds issued by it is an excessive degree of involvement and entanglement of the State in the activities of the College, in contravention of the Religion Clauses of the First Amendment.

Subsidiary to the main issue is the proposition that the Board's regulation, adopted under the Act, permitting, at the College's option, provisions in the mortgage and trust indenture which would remove the restriction of the financed facilities from religious use would not apply in case of foreclosure of the mortgage and judicial sale, authorizes the advancing of religion by the State in such a case in violation of the First Amendment. The only purpose of the provision is to permit religious use of the state-financed facilities, and this is impermissible during their useful life.

ARGUMENT

I

Will impermissible State involvement in the affairs of the Baptist College at Charleston under the Religion Clauses of the First Amendment necessarily result from the issuance of the State's revenue bonds for it under the South Carolina Educational Facilities Act, in view of the provisions of the Act which empower the State Budget and Control Board, in seeing that the bonds are paid, to fix and revise from time to time fees and charges for the use of and the services furnished by the College's facilities financed thereby, and to regulate the operation thereof?

The Authority acts as and for the State of South Carolina; the State Budget and Control Board is a part of the State government and its members constitute the Authority *ex officio*. The Act declares the Authority to be a public instrumentality, and the exercise of its powers is deemed the performance of an essential public function. The State Budget and Control Board is granted the Authority's functions and powers "as an incident of its functions in connection with the public finances of the State." (Act Par. D; Jurisdictional Statement, 35.)

Two pronouncements of the Supreme Court of South Carolina emphasize the nature of the responsibilities which the Act under consideration devolves upon the Board, in connection with the payment of the principal and interest on the State's revenue bonds which the Act authorizes the Board to issue for an institution of higher learning.

First, the Court, in the opinion which is under appeal, stated:

> "Counsel for plaintiff argues that the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management and administration of the College. We do not so construe the Act. A reading of the Act and the proposal of the College as submitted to the Authority by petition for approval, indicates that **the basic function of the Authority is to see** that religion is not promoted on the leased premises, and **that fees are charged sufficient to meet the bond payments.** The decisions recognize that some involvement between church and State is not constitutionally obnoxious. It is a question of degree and each case must be judicially determined on its own facts, taking into consideration all of the relevant factors." (Emphasis added.)

Secondly, while the revenue bonds issued by the Board are declared not to be a debt or liability of the State or a pledge of its faith and credit, the Supreme Court of South

Carolina in *State ex rel. Roddey v. Byrnes, Governor,* 219 S. C. 485, 507, 66 S. E. (2d) 33, 42 (1951), recognized the practical fact of economic life that "it is not believed that a State in this enlightened day would allow its so-called revenue bonds to go unpaid irrespective of its technical, legal liability."

It seems proper to say that the Board acting as the Authority is doubly concerned with the fiscal operations of the College and its ability to pay the reserved rent which pays the bonds, both in relation to the payment of the bond holders and to the credit of the State.

The Court below considered the facts in *Tilton v. Richardson,* 403 U. S. 672, to be "greatly similar to the facts in this case" (Jurisdictional Statement, 28) and found "that there is less potential for experiencing the substantive evils which the religious clauses were intended to protect than in *Tilton.*" *Hunt v. McNair, Governor,* —— S. C. ——, 187 S. E. (2d) 645, 651, 652.

The Court also said that "The surveillance on the part of the State, obviously abhorred by the Court, is not necessary under the proposed financing plan of the college," and "that upon delivery of the bonds the interest of the Authority would, for all practical purposes, cease." (Jurisdictional Statement, 26.)

However, it is respectfully submitted that the due exercise of the powers given by the Act to the Board in relation to its "basic function to see * * * that fees are charged sufficient to meet the bond payments" necessarily implies and requires continuing surveillance of the operations and the fiscal affairs of the college as long as any of the bonds or coupons are outstanding and unpaid. In the case of a church-related college, this unavoidably results in involvement and entanglement of the State in the affairs of a religious activity to an extent which is im-

permissible under the First Amendment. *Tilton v. Richardson, supra; Lemon v. Kurtzman, supra; Walz v. Tax Commission,* 397 U. S. 664.

In *Tilton* the validity of a one-time single-purpose grant to a church-related institution of higher learning for the construction of academic facilities was upheld, except for the provision of a limitation on sectarian use for a period less than the useful life of the facilities.

The plurality opinion stated that three factors substantially diminished the extent and the potential danger of entanglement which the Court found excessive in the Rhode Island and Pennsylvania legislation considered in *Lemon v. Kurtzman.*

"First, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education," religious indoctrination not being "a substantial purpose or activity of these church-related colleges and universities," which have "admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." Furthermore, "college students are less impressionable to religious indoctrination" than students in primary and secondary schools, a view said to be supported by common observation, which "Congress may well have entertained."

Secondly, "the nonideological character of the aid which the government provides" lessens the entanglement between church and state. The Court says that "the government provides facilities that are themselves religiously neutral", more like "government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school which they attend", and unlike subsidies to teachers who "are not necessarily religiously neutral". "The risks of government aid to religion and the corresponding need for surveillance are therefore reduced."

Thirdly, government entanglements with religion are reduced by the circumstances that "the government aid here is a one-time, single-purpose construction grant", without "continuing financial relationship or dependencies, no annual audits, and no governmental analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact."

The opinion stated that no one of these three factors standing alone is necessarily controlling. Cumulatively they were considered to shape a narrow and limited relationship with less potential than the Rhode Island and Pennsylvania state schemes for "realizing the substantive evils against which the Religion Clauses were intended to protect," and a lessened "potential for devisive (sic) religious fragmentation in the political arena."

The third of the factors which cumulatively served to uphold the Federal Act in *Tilton* is absent in the instant case. The involvement or entanglement between the State and the Baptist College is entirely different from that in *Tilton*, and very much greater.

In *Tilton* the "one-time" transaction was a grant with no obligation on the government's part in respect to repayment of bonds. There was no continuing interest in or responsibility in connection with the operations or the financial condition of the college, no annual or other audits, no contact at all except in respect to non-religious use, said by the Court to be minimal.

In the proposed Baptist College transaction, the Authority will receive the conveyance of much of its campus and the facilities thereon; will then, as Landlord, lease the land and facilities to the College at a rental sufficient to meet the payment of principal and interest as due on the proposed bond issue; will give a foreclosable mortgage

on the project property and facilities and a lien on the rentals provided for in the lease; will have the power and responsibility to fix and from time to time revise the institution's charges and fees (Act, Pars. E (g), L, Jurisdictional Statement, 36, 41) the performance of which responsibility may be compelled by any bondholder (Par. N, *id.* 43); will have the power to operate or provide for the management and operation of the project (Par. E (e), *id.* 36), and to establish rules and regulations for the use of the properties conveyed to it by the college. (Par. E (h), *id.* 36.)

The Board acting as the Authority is necessarily expected, in meeting its responsibilities to the bondholders and to the State, to keep itself fully informed, by reports, examination of records, balance sheets, and periodical audits, of the College's operations and financial progress. Since the College's income is derived from student fees and charges, they must be set annually by the College in the light of the last year's operations and the ensuing year's budget requirements for its total operations; faculty salaries, supplies, maintenance and repairs, insurance, and the like, as well as the rent due on the lease to the State.

The powers which the Act gives to the Board in relation to the payment of the bonds (both as to the operation of the leased property and the fixing and from time to time revising charges and fees) necessarily imply close and continuing observation by the Board of the College's total fiscal operations and clearly contemplate the exercise of such powers in a timely manner to forestall any default in the principal and interest payments on the bonds. In the event of financial difficulty the Board must step in and fix the College's student fees and charges to see that it will be able to pay the rent which pays the bonds.

The Board's responsibilities will not end with the fixing of the fees being charged when the bonds are initially

issued and sold; such reponsibilities will continue as long as bonds and coupons are outstanding and undischarged.

It is respectfully submitted that, under the applicable decisions, the proposed transaction under the South Carolina Educational Facilities Act will involve the State in excessive entanglement and impermissible involvement with the Baptist College at Charleston in its operations and financial affairs, in contravention of the Religion Clauses in the First Amendment.

II

Are the provisions in the State Budget and Control Board's regulations which permit the removal of the restriction against religious use of the financial facilities in case of judicial sale thereof under mortgage foreclosure invalid in the transaction with the Baptist College at Charleston because religion would be advanced in such a case in contravention of the Religion Clauses of the First Amendment?

It should and will be assumed for the purpose of the consideration of this question that a Lease Agreement and Trust Indenture will contain all of the provisions favorable to the applicant for assistance that the Act and the Authority's Rules and Regulations may authorize.

The Authority is authorized and empowered by the Act to mortgage any project and the site thereof for the benefit of the holders of revenue bonds issued to finance the project. (Act, Par. E (k), Jurisdictional Statement, 37.)

The Authority's Rules and Regulations provide that the Trust Indenture shall create a foreclosable lien by way of mortgage covering the project site and property acquired with the proceeds of the bonds. The Trust Indenture may provide that upon foreclosure and sale to any person other than the Institution for which the bonds are

issued, the purchaser hall receive a fee simple title without conditions restricting the use of the premises. (Jurisdictional Statement, 50.)

The Authority's Rules and Regulations also provide that the Lease Agreement may permit the Institution to repurchase the project upon payment of the bonds subject to the condition that, so long as the Institution or its voluntary grantee shall own the premises, the property shall be restricted against use for sectarian instruction or as a place of religious worship. However, at the option of the Institution, such restriction shall not continue against a purchaser at an involuntary judicial sale as the result of foreclosure of any mortgage, a provision which can only have reference to a mortgage given by the Institution after repurchase upon payment of the bonds. (Jurisdictional Statement, 49.)

It would seem clear that, under the holding in *Tilton v. Richardson* that the 20 year limitation upon the condition against sectarian use of the facilities constructed with the Federal grant is invalid, the provisions which permit sectarian use of a facility constructed with the proceeds of the State's revenue bonds are also invalid.

The only purpose of removing the condition against sectarian use is to enjoy some additional value for such facilities that would not be present with the condition against sectarian use still on the facility, because the property can then be used for religious purposes. This clearly constitutes aid by the State of the kind prohibited by the First Amendment.

It is true here as it was in *Tilton v. Richardson* that "the unrestricted use of a valuable property is in effect, a contribution of some value to a religious body", and that the original governmental assistance will in part have the effect of advancing religion if the facility which results therefrom can be "converted into a chapel or other-

wise used to promote religious interests", whether by the recipient of the assistance or its involuntary grantee who advanced credit upon the value in part resulting from its lack of restriction against sectarian use.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the Supreme Court of South Carolina affirming the trial court's declaration that the Educational Facilities Authority Act, as construed and applied in respect to the proposed revenue bond transaction between the Authority and the Baptist College at Charleston, is valid under the Religion Clauses of the First Amendment and its denial of the injunctive relief sought by the Appellant, should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 71-1523

RICHARD W. HUNT, APPELLANT,

versus

ROBERT E. McNAIR, GOVERNOR OF THE STATE OF SOUTH CAROLINA, ET AL., APPELLEES

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF APPELLEES

OPINION

The statements made in the Appellant's Brief on this subject are sufficient.

JURISDICTION

The statements made in the Appellant's Brief on this subject are sufficient.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Omitted from the statutory provisions herein involved is the definition of "Project" as that term is used in the South Carolina Educational Facilities Authority Act.

The type of project which the South Carolina Educational Facilities Authority is permitted to undertake is defined as follows:

(b) "Project", shall mean a structure or structures available for use as a dormitory or other housing facility, including housing facilities for student nurses, a dining hall, student union, administration building, academic building, library, laboratory, research facility, classroom, athletic facility, health care facility, and maintenance, storage or utility facility and other structures or facilities related thereto or required or useful for the instruction of students or the conducting of research or the operation of an institution for higher education, including parking and other facilities or structures essential or convenient for the orderly conduct of such institution for higher education, and shall also include landscaping, site preparation, furniture, equipment and machinery and other similar items necessary or convenient for the operation of a particular facility or structure in the manner for which its use is intended but shall not include such items as books, fuel, supplies or other items the costs of which are customarily deemed to result in a current operating charge, and shall not include any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination.

QUESTIONS PRESENTED FOR REVIEW

1. Does the financial arrangement contemplated by the South Carolina Educational Facilities Authority Act create impermissible State involvement in the affairs of the Baptist College at Charleston in violation of the establishment clause of Amendment I to the Constitution of the United States?

2. Does that provision of the State Board's regulations which permits the removal of the restriction against religious use of financed facilities in the event of a judicial sale under mortgage foreclosure advance religion in contravention of the First Amendment?

STATEMENT OF THE CASE

The South Carolina Educational Facilities Authority Act (Section 25 of Act No. 349 of the Acts of the General Assembly of South Carolina for the year 1969, 1969 Acts, Page 603), hereinafter called "the Act", was enacted for the purpose of rendering a measure of assistance to the private institutions of higher education in South Carolina and to provide an alternative method of enabling such institutions to undertake the projects defined in the Act.

In essence it provides for a sale of South Carolina special revenue bonds whose proceeds would pay for Projects undertaken by an institution for higher learning and which would be repaid by lease payments or other charges made by the institution. Since interest on the bonds would not be subject to State or Federal Income Tax by the recipients thereof, the interest cost to the institution would be substantially less than if the institution borrowed in conventional fashion. Roughly speaking, the savings could be as much as 2% per annum. On a $1 Million undertaking with a 20-year average maturity, this would amount to $400,000.00.

There are some nineteen 4-year private colleges in South Carolina. Of these, thirteen are church related and include institutions sponsored by the Baptist Church, Presbyterian Churches and the Episcopal Church. In addition, there are some eight private Junior Colleges, of which six are church related and two are non-church related. All of these institutions fall into the category of institutions for higher learning, as that term is defined in the Act. Among the nineteen 4-year private colleges is the Baptist College at Charleston. The affairs of the College are managed by a Board of Trustees which has as its policy no restriction upon the enrollment or faculty based upon the religion of the faculty members or students. The College was founded by the Baptist Convention of South Carolina and the purpose of the College as stated in its Charter is to operate a Baptist liberal arts college for educational purposes. The College is attended by Roman Catholics, Protestants, Jews, and members of other religious denominations. Its faculty includes representatives of several different denominations.

The financial transaction which is contemplated by the Act is so similar in nature to the so-called "Industrial Development Bond" that a comparison of the two will clarify the nature of the State's role in providing assistance through the procedure permitted by the Act.

In the case of the Industrial Development Bond Act the issuing agency in South Carolina is the county. In other states public authorities or municipalities are sometimes the issuing agencies, but the function of all is substantially the same. In South Carolina the county and the industry enter into what is generally called a lease agreement. Under the terms and provisions of this agreement the county acquires the land and agrees to finance the construction of the desired industrial facility. Simultaneously it leases the same to the industry at a rental sufficient to pay the principal and interest of the bonds, and to discharge

other obligations incident to ownership, such as maintenance and insurance. As a general rule the agreement provides that the industry will purchase the project for $1.00 upon payment of the bonds. This type of lease requires the industry to make the rental payments free of claim or offset. This type of agreement is essentially an installment purchase. The county then (simultaneously) enters into an indenture which makes provision for the issuance of the county's industrial development bonds. The county not only mortgages the project, but also assigns to the trustee under the indenture all of the county's rights under the lease agreement. The bonds are then issued; their proceeds deposited with the trustee bank, which thereafter causes them to be applied to the construction of the project. Once the bonds are issued, the county steps aside, and from that time on, the bondholder looks to the trustee to enforce the county's rights under the lease and to require the industry to pay the rentals required to pay the principal and interest of the bonds. The county's real function in the transaction is to issue bonds whose interest has a tax free status.

The routine followed in the case of industrial development bonds is parallelled under the Act. Here the Authority would acquire the project site and take title to the same; simultaneously enter into a lease agreement with the College, which would obligate the College to pay, by way of rent or other charge, an amount sufficient to provide for the payment of the principal and interest of the bonds to be issued by the Authority. The Authority would simultaneously enter into a trust indenture with a trustee bank, pursuant to which the bonds would be issued. The Authority would mortgage the project for the security of the bonds. In addition, the Authority's rights under the lease agreement would be assigned to the trustee bank.

At this point in time the Authority would, from a practical standpoint, step aside and thence forward the bondholders would look to the trustee for their rights and remedies. In the case of industrial development bonds issued by South Carolina counties, the county is a conduit pure and simple. In the case of bonds issued under the Act, the Authority is likewise a conduit pure and simple, with but a single exception.

The State Act here, like the Federal act involved in *Tilton v. Richardson*, 403 U. S. 672 (1971), specifically requires that no project undertaken by the Authority be used for sectarian instruction, or as a place of religious worship, or in connection with any part of a program of a school or department of divinity for any religious denomination. In order to implement this provision of the Act, the Authority adopted regulations which, among other things, require that the lease agreement must contain:

1. A covenant prescribing that neither the leased land, nor the facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination.

2. A provision permitting the Authority or any agent of the Authority to conduct such inspections as may be necessary to determine whether the covenant set forth in 1 is being complied with.

3. A provision agreeing that the covenant set forth in 1 above could be enforced by the Authority, the Attorney General of South Carolina, or any taxpayer.

The final requirement for the lease agreement goes to the use of the project following the repayment of the bonds. Unlike the Federal act involved in *Tilton*, which provided for a gift of Federal money for use in the construction of a building or like facility with a definite life, measurable in years, it was recognized here that a project under

the Act might provide for the acquisition of land with part of the proceeds of bonds. Accordingly, to comply with the spirit of the plurality opinion in *Tilton* it became necessary to require that the project continue to be devoted to non-sectarian purposes.

After the bonds have been issued, only two results could obtain. The bonds would be paid and the project conveyed to the institution, or, the mortgage would be foreclosed and the property would be put up at public sale.

Most of the private institutions of higher learning in South Carolina are far from wealthy and the security afforded by a forecloseable mortgage is essential to the proper marketing of bonds. Accordingly, the final provision required in the lease agreement is that if the bonds are paid off, the reconveyance shall be subject to the condition that the project not be used for sectarian instruction or as a place of worship or in connection with any part of a program of a school or department of divinity of any religious denomination. Such a condition enforces the continued use of the project for non-sectarian purposes. On the other hand, if the bonds were not paid and the project foreclosed, the particular institution benefited by the State action would no longer be in the picture, and the purchaser at the judicial sale would be entitled to a good and marketable title, free of liens, claims, conditions or encumbrances. Without such a title the basic security afforded by the forecloseable mortgage would be diminished, creating serious difficulty in marketing the bonds.

SUMMARY OF ARGUMENT

Inasmuch as simultaneously with the consummation of the loan contemplated by the Act, all rights of the Authority are assigned to a trustee bank to enforce the rights of the bondholders with respect to the repayment, the Authority is no longer involved with the College except to the limited extent of inspections as to use. The resulting relationship here between the Authority and the College, therefore, is basically the same as the resulting relationship in *Tilton*.

When considered in the light of the applicable guidelines, any entanglement in this case would be no more offensive than the entanglement in *Tilton*, and the South Carolina Supreme Court on remand has so determined. This decision of the South Carolina Supreme Court which was expressly sought by the United States Supreme Court should be permitted to stand unless the findings of the South Carolina Supreme Court are clearly erroneous; a situation which does not exist.

The entanglement here is substantially different from the entanglement in *Tilton* and *DiCenso* due to the absence here of the use of any tax revenues; consequently the assistance provided the Baptist College is the result of a tax exemption which cannot be denied on First Amendment grounds. The continuing inspection as to use does not create any impermissible entanglement.

The provisions of the regulations permitting the removal of the restriction against religious use of financed facilities in the event of a judicial sale under mortgage foreclosure constitutes no benefit to the Baptist College and hence, does not offend the First Amendment.

Question I

Does the financial arrangement contemplated by the South Carolina Educational Facilities Authority Act create impermissible State involvement in the affairs of the Baptist College at Charleston in violation of the establishment clause of Amendment I to the Constitution of the United States?

In its *Per Curiam* decision rendered March 2, 1972, following the remand of this case by the Supreme Court of the United States on June 28, 1971 (403 U. S. 945, 91 S. Ct. 2276, 29 L. Ed. (2d) 854) the Supreme Court of South Carolina reconsidered its prior holding in the light of the decisions of the Supreme Court of the United States in the cases of: *Lemon, et al. v. Kurtzman, et al.*, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. (2d) 745; *Tilton, et al. v. Richardson, et al.*, 403 U. S. 672, 91 S. Ct. 2091, 29 L. Ed. (2d) 790; *Earley, et al. v. DiCenso, et al.*, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. (2d) 745, and *Robinson, et al. v. DiCenso, et al.*, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. (2d) 745. It held that the Act was a valid exercise of the legislative power of the General Assembly of South Carolina and stated: "It has a secular legislative purpose. It neither advances nor inhibits religion. There is no fostering of an excessive government entanglement with religion."

The appeal here concerns itself merely with the last statement, *viz.*, it challenges the holding of the South Carolina Supreme Court that the Act would not foster an excessive government entanglement with religion. In its holding the South Carolina Supreme Court noted the similarity of the situation which exists under the Act and the situation which existed in the *Tilton* case. In *Tilton* there was a government grant made directly to the institution upon a showing that the facility to be constructed with the proceeds of the grant would be used for secular pur-

poses. The Federal act enforced that provision by prescribing that any violation would subject the recipient of the grant to the obligation to repay an amount equal to the proportion of the facility's then value that the Federal grant bore to the original cost. The remedy which was made available to the Government for a 20-year period, was in effect rewritten by the Court's removal of the 20-year limitation.

Under the South Carolina Act no grant is made. Therefore, other means had to be prescribed to insure compliance with the covenant that the project would not be used for sectarian or religious purposes. This is accomplished by the covenant which is enforceable by the Authority, by the Attorney General or by any taxpayer. But, apart from the remedy, the two situations are basically similar for the reason that a single transaction is involved.

The Appellant stresses the State's continuous obligation to supervise fees or other charges imposed by the institution in order to determine that they are sufficient to meet bond payments. In so doing the Appellant avoids the substance of the transaction. The Act prescribes, and the lease agreement will provide, an obligation on the institution to pay, without offset or other claim, rental or charges sufficient to pay the principal and interest of the bonds. It is true that this agreement is made between the institution and the Authority. However, simultaneously with the consummation of the transaction the rights of the Authority are assigned to a trustee bank under the indenture, and thenceforth the trustee, in discharge of its duties under the indenture, would exercise those rights, so that if default arose the action which would follow would be instituted by the trustee for the benefit of the bondholders and while presumably the Authority might be a party to such an action, the result sought by the action would either be for the enforcement of the covenants made

by the institution in the lease agreement or for the foreclosure of the mortgage. From a practical standpoint, there is no entanglement on the part of the State, but even if there were a failure on the part of the trustee to act, and voluntary action on the part of the State, it would not involve entanglement by the State and the institution. It would simply be a creditor's action to enforce financial obligations incurred by the institution.

Private colleges, be they church supported or otherwise, like private individuals and private corporations, are required to make financial arrangements in order to exist. Borrowing money is unfortunately an every day part of their business life.

Appellees assume that because of the far-reaching effect of this decision the Court will judge the transaction here involved in the light of its substance and that if a majority adhere to the plurality opinion in *Tilton*, it will treat the transaction as a simple financial arrangement made by the State for the borrowing institution with the lending bondholders.

The Court's attention is directed to the fact that while no bonds have been issued pursuant to the South Carolina Act, since this is the declaratory action to determine the validity of the Act, in the light of the First Amendment question, many other States have similar acts which have been in effect for a great many years. Under these acts bonds have been issued and are outstanding, the proceeds of which were used directly or indirectly by church supported institutions of higher learning for secular facilities. The effect of the decision here will transcend its importance to the parties to this case and the institutions for higher learning in South Carolina. An adverse decision could have serious impact upon church supported institutions for higher learning throughout the United States. This has not been written to suggest that the result

here should simply be an expedient one. It is written to emphasize the argument that the substance of the transaction should be considered, rather than its form.

A further factor should be considered by this Court in reaching its decision. On the first appeal to this Court its majority neither set the case for argument nor ordered it reversed, but on the contrary, returned the case to the Supreme Court of South Carolina, in order that that Court might reconsider its previous holding in the light of *Lemon, Tilton,* and the two *DiCenso* cases. The Supreme Court of South Carolina has so reconsidered this case and has found that the substance of the transaction between the State, the institution for higher learning, and those who would lend money for the benefit of the institution for higher learning is as set forth in the argument here. It has further found, on that basis, that no excessive entanglement with religion will result.

Presumably, this Court would not have returned this case to the Supreme Court of South Carolina for reconsideration if it did not intend to attach weight to its findings. Accordingly, we respectfully suggest that unless such findings are clearly erroneous, the factual results as found by the South Carolina Supreme Court should stand. We do not believe that a clearly erroneous situation exists.

The majority opinion in *DiCenso* sets forth the guidelines to be considered in determining whether an excessive entanglement results. When considered in the light of the guidelines, there is less entanglement here than there was in *Tilton.*

With regard to the first guideline, the **character and purpose of the institution benefitted,** the institutions involved in *Tilton* were governed by Catholic religious organizations and the faculties and student bodies were predominantly Catholic. No "religious organization" governs

the Baptist College, and its student body is only about 60% Baptist, which is the ratio of Baptists in South Carolina. Finally, there is no requirement here, as there was at the institutions benefited in *Tilton,* that students must take theology courses.

With regard to the second guideline, **the nature of the assistance provided,** in both cases the assistance provided is of a non-ideological character in the form of neutral facilities. Moreover, of vital significance is the fact that the assistance here does not originate from tax revenues and, therefore, no taxpayer is required to contribute to the financing of facilities at the Baptist College.

Finally, with regard to **the resulting relationship between the government and the religious organization,** the form of the relationship here differs from the form of the relationship in *Tilton,* but, in substance, the resulting relationship is no more entangling. As pointed out hereinabove, once the assistance has been provided through the issuance of the bonds and the proceeds have been turned over to the trustee, the relationship between the State and the Baptist College is, in fact, ended, except for inspection as to use.

On remand, the South Carolina Supreme Court carefully considered the facts of this case in the light of the guidelines and concluded: "When one considers the character and purpose of the College and the nature of the assistance provided, and the resulting relationship between the government and the College, it necessarily follows that there is less potential for experiencing the substantive evils which the religious clauses were intended to protect than in *Tilton.*"

In the foregoing discussion, we have considered the question of entanglement as one of degree, comparing the extent of entanglement in this case with the extent of entanglement in *Tilton.* However, there is a distinction

in substance between the relationship in *Tilton* and *Di-Censo* and the relationship which will result here between the Educational Facilities Authority and the Baptist College. The substantial difference is the absence in this case of the use of any tax revenues, with the result that (1) there is no use of taxes collected from the citizens of all faiths and of no faith, and (2) there is no danger of competition among religious groups for State appropriations.

The assistance here is by way of a tax exemption provided by Section 103 of the Internal Revenue Code of 1954 for interest on State obligations. In 1969 Congress limited the availability of this exemption for the benefit of private corporations, but expressly excluded from limitations otherwise imposed on industrial development bonds obligations issued for the benefit of certain non-profit institutions. This federal tax exemption has, by virtue of the Act of the South Carolina General Assembly under consideration, been made available to institutions of higher learning in the State of South Carolina as defined in the Act.

The substance of this assistance is the same as would be afforded to the Baptist College if Congress, instead of permitting indirect tax free borrowing, exempted from Federal income taxes interest paid by non-profit educational institutions on loans incurred to finance the acquisition, construction, enlargement and renovation of necessary land and buildings. Considered in that light, such an exemption cannot be denied a sectarian institution on First Amendment grounds, *Walz v. Tax Commission of the City of New York*, 397 U. S. 664.

Against that background, even the continuing relationship between the State and the Baptist College is not impermissible entanglement. As far as inspection as to use is concerned, State and local governments exercise a continuing surveillance daily to insure compliance with literally hundreds of laws relating to the use of religious

facilities in every state of the nation, including zoning laws, health and fire regulations, etc. Here the continuing relationship is likewise merely to insure that the use of the facilities complies with all of the applicable statutes and regulations. The enforcement of such limitations as to the use of religious facilities does not, *per se,* result in any impermissible entanglement; and such enforcement has been classified by the Court decisions as impermissible entanglement only where the violation of such restrictions as to use would result in the use of tax moneys, extracted from all taxpayers, for the benefit of a religion.

The other aspect of the continuing relationship relates to the repayment of the bonds. As previously discussed, all of the State's functions in this regard are transferred to a trustee. That the State plays no role insofar as the repayment of the bonds is concerned can be made more obvious by eliminating the State altogether from the repayment procedure. Assume that the State, simultaneously with the issuance of the bonds and the leasing of the property to the Baptist College, conveys the leased property by deed to the trustee, subject to the lease, as security for the bondholders. If such a transfer were made the mere formal involvement of the State would no longer exist, and the State obviously could have no role with respect to repayment of the bonds. However, the relationship of the parties in interest, *viz.* the College, the trustee and the bondholders, their respective rights with respect to the property involved, and the bondholders' rights with respect to repayment would not be altered one iota by such a conveyance. Consequently, mere retention of title by the State is of no effect whatsoever and gives rise to no continuing relationship between the Baptist College and the State.

If there should be any lingering doubts on this point, we invite the Court to follow the course followed in *Tilton*

and to strike the offending authorizations of the Act and to sustain the balance of the Act.

Question II

Does that provision of the State Board's regulations which permits the removal of the restriction against religious use of financed facilities in the event of a judicial sale under mortgage foreclosure advance religion in contravention of the First Amendment?

The challenge here goes to the last provision of the State Authority's regulations relating to the lease agreement, which in substance provides that if the mortgage given by the Authority to the indenture trustee is foreclosed, the purchaser at the judicial sale will receive a clear title to the premises, free of the covenant applicable to the institution or any voluntary grantee of the institution, relating to the future use of the foreclosed properties. This is thought to be an essential provision in the structuring of the financial arrangement which is essentially one between the institution and its lenders (the bondholders).

In South Carolina, at least, private institutions of higher learning, including church supported colleges, are almost inevitably impecunious borrowers. Hence, the security afforded by the mortgage on the project undertaken by the institution is very real security and an essential inducement to the loan. If foreclosure takes place, the institution will no longer have an interest in the subject property. Any benefit derived from the sale of the property will pass to a third party. The result would be precisely the same result that would obtain had the institution borrowed directly from the lender rather than through the arrangement made with the State Authority. In most instances the institution will have owned the property that is to be mortgaged prior to the issuance of the bonds. Such

are the facts in the case here, where part of the security for the arrangement sought by the Baptist College consists of property already owned by the institution. It is that specific property which would be conveyed to the Authority and mortgaged by the Authority for the security of the bonds. Certainly, under the facts of this case, no advantage with respect to the use of the property has been obtained by the Baptist College. The quotation from *Tilton* in the Appellant's Brief that the unrestricted use of valuable property is in effect a donation of some value to a religious body, overlooks the fact that subsequent use of the property following foreclosure would not be by the institution participating in the transaction, but by third parties.

CONCLUSION

It is respectfully urged that the judgment of the Supreme Court of South Carolina should be upheld.

Respectfully submitted,

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Attorney General of South Carolina.

THEODORE B. GUERARD,
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FEB 20 1973

MICHAEL RODAK, JR., CL

In The

Supreme Court of the United States

No. 71-1523

RICHARD W. HUNT,

Appellant,

vs.

ROBERT E. McNAIR, Governor of the State of South Carolina, et al.,

Appellees.

On Appeal from Supreme Court of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME AND BRIEF AMICUS CURIAE

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In The

Supreme Court of the United States

October Term, 1973

No. 71-1523

RICHARD W. HUNT,

Appellant,

vs.

ROBERT F. McNAIR, Governor
of the State of South Carolina, et al.,

Appellees.

On Appeal From the Supreme Court of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME

The Attorney General of the State of New Jersey hereby moves for leave to file out of time the attached brief amicus curiae on the grounds that although he attempted to ascertain the briefing schedule in order that New Jersey could participate in this matter in a timely fashion, he was unable to do so and thereby inadvertently allowed the time for filing to elapse. The attorneys for the appellant and appellees have consented to the filing of this brief.

On July 14, 1972, the Attorney General of New Jersey wrote to the Attorney General of South Carolina indicating that New Jersey might be interested in participating as amicus curiae if an appeal was taken to the Supreme Court of the United States in this case and asked that he be advised if and when a petition for a Writ of Certiorari or a Notice of Appeal were filed. The Attorney General of South Carolina responded through the attorney for the appellant that a Jurisdictional Statement had been filed but no action taken by this Court. After this Court noted probable jurisdiction on October 16, 1972, the Attorney General of New Jersey contacted the office of the Clerk of the Supreme Court of the United States and was informed that, as of that date, no briefs had been filed. On December 15, 1972, the Attorney General of New Jersey again wrote to the Attorney General of South Carolina and asked for the briefing schedule in order to participate in this matter in a timely fashion. (Since New Jersey supports the position of South Carolina its brief should be filed at the same time as that of South Carolina.) Although the Attorney General of New Jersey received a response from South Carolina on or about January 2, 1973, such response did not include the requested briefing schedule or any indication whether South Carolina's brief had, in fact, been filed. On January 25, 1973, the Attorney General of New Jersey telephoned the office of the Clerk of the Supreme Court of the United States and was advised that the appellant's brief had been filed on November 25, 1972 and that the brief on behalf of South Carolina had been filed on December 27, 1972. Immediately, the within brief was prepared.

In view of the extent of New Jersey's interest in the adjudication of this issue, and of the fact that the Attorney General of New Jersey made every attempt to ascertain the proper briefing schedule, it is respectfully submitted that this Court should grant the requested leave to file the attached brief amicus curiae out of time.

Respectfully submitted,

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Attorney General of New Jersey

STEPHEN SKILLMAN
Assistant Attorney General
Of Counsel

In The

Supreme Court of the United States

October Term, 1973

No. 71-1523

RICHARD W. HUNT,

Appellant,

vs.

ROBERT E. McNAIR, Governor of the State of South Carolina, et al.,

Appellees.

On Appeal From the Supreme Court of South Carolina

BRIEF OF AMICUS CURIAE THE ATTORNEY GENERAL OF NEW JERSEY

Interest of Amicus Curiae

In 1966 the New Jersey Legislature adopted the New Jersey Educational Facilities Authority Law (hereinafter "Law") which established the New Jersey Educational Facilities Authority (hereinafter "Authority") within the State Department of Higher Education. L. 1966, c. 106, 107, 108, 109 and 110 (N.J.S.A. 18A:72A-1 through 39). This Law is similar to the South Carolina Educational Facilities Authority Act which is the subject of this appeal.

Both statutes establish an educational facilities authority to assist private institutions for higher education to build necessary educational facilities, e.g., dormitories, dining halls, student unions, administration buildings, academic buildings, libraries, laboratories, research facilities, classrooms, athletic facilities, storage facilities and other facilities required for the instruction of students or research. N.J.S.A. 18A:72A-3; S.C. Code Ann. §22-41.2 (1962). Whereas the New Jersey Authority can assist both public and private institutions, the South Carolina Authority's aid is limited to private institutions. Each statute specifically excludes assistance for "any facility used or to be used for sectarian instruction or as a place for religious worship." N.J.S.A. 18A:72A-3; S.C. Code Ann. §22-41.2 (1962).

The aforementioned educational facilities or projects are financed by borrowing money at the low interest rates afforded by the tax exempt status of the authorities' bonds. These bonds are the sole responsibilities of the authorities and are not debts or liabilities of the states. N.J.S.A. 18A:72A-8, 10, 18, 37; S.C. Code Ann. §22-41.8, 10, 14 (1962). The authorities are self-sustaining in that the principal and interest payments on the bonds and the expenses of maintaining the facilities are paid out of the revenues derived from the use of the facilities. N.J.S.A. 18A:72A-11, 30, 31; S.C. Code Ann. §22-41.5, 8 (1962).

The New Jersey Authority can finance a facility at a private institution by the same lease-back

method described in the appellees' brief at page 5. N.J.S.A. 18A:72A-30. However, as a matter of practice, the New Jersey Authority has financed projects at private institutions primarily by means of a loan agreement secured by a mortgage of the land, buildings and contents, by a pledge of the general resources of the institution, and by a special fee or tuition imposed and collected by the institution. N.J.S.A. 18A:72A-30, 31, 32. As in South Carolina, the New Jersey Authority appoints a trust company or bank as trustee for each bond issue. N.J.S.A. 18A:72A-9; S.C. Code Ann. §22-41.9 (1962). The trustee receives the fees collected by the institution and collects the mortgage payments or rents charged to the institution, pays the principal and interest to the bondholders and assumes general fiscal supervision in connection with the bonds issued.

The constitutionality of the New Jersey Law was challenged on State constitutional and First Amendment grounds and has been the subject of three opinions by the Supreme Court of New Jersey. Clayton v. Kervick, 52 N.J. 138, 244 A.2d 281 (1968); 56 N.J. 523, 267 A.2d 503 (1970); vacated and remanded for reconsideration in light of Lemon v. Kurtzman; Earley v. DiCenso; Robinson v. DiCenso and Tilton v. Richardson, 403 U.S. 945 (1971); 59 N.J. 583, 285 A.2d 11 (1971).

In the first Clayton v. Kervick case, the Supreme Court of New Jersey held that the Law does not violate either the debt limitation clause or the loan of credit clause of the New Jersey Constitution. In the second Clayton v. Kervick

case, the Court held that the financing of projects at sectarian institutions of higher learning does not violate the Establishment Clause of the First Amendment. It said that the Authority is engaged in what is essentially a banking operation which the State cannot deny to sectarian institutions for higher education any more than a municipality can deny sectarian institutions water, electricity or police and fire protection. The Court emphasized that the First Amendment is basically neutral in that government can neither aid nor inhibit religion and to deny such services would at least invite the claim that religion is thereby inhibited.

The Supreme Court of the United States remanded this decision with the following instructions:

> "Judgment vacated and cases remanded for reconsideration in light of this Court's decisions in Lemon v. Kurtzman, Earley v. Di Censo, and Robinson v. Di Censo, ante, p. 602; and Tilton v. Richardson, ante, p. 672." 403 U.S. 945.

This remand was on the same day and presumably for similar reasons as the remand of the instant appeal to the Supreme Court of South Carolina. Hunt v. McNair, 403 U.S. 945 (1971).

On remand, the supreme courts of both states held that the respective laws did not violate the First Amendment. Clayton v. Kervick, 59 N.J. at 583, 285 A.2d at 11; Hunt v. McNair, 187 S.E.2d 645 (1972). The Supreme Court of New Jersey held that the New Jersey Law is valid,

that a facility may never "be used for sectarian instruction or as a place for religious worship," and that no college may participate if it restricts entry on racial or religious grounds or requires all students to receive instruction in the tenets of a particular faith.[1] The Court added that it could not say whether other religious precepts or practices, unrelated to the immediate use of the facility, will disqualify a college but regardless of the disqualification of particular colleges the Law is still valid.

1. This Court in its plurality opinion in Tilton v. Richardson, supra, hinted, without reaching the question, that certain institutions of higher education might, if challenged, be found constitutionally ineligible for government construction assistance if they impose religious restrictions on admissions, require attendance at religious activities, compel obedience to church doctrine, require instruction in theology, and otherwise act to propagate a particular religion. 403 U.S. at 682. Justice White in a "postscript" to his opinion concurring in the Tilton decision states with more certainty that he would find unconstitutional any governmental assistance to a school which "restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith." 403 U.S. at 671, n. 2. As Justice White's vote was required for the result obtained in Tilton, it could be inferred that any governmental assistance to higher education which was in contravention of the two strictures set forth in his opinion would have been struck down by the Court. The Supreme Court of New Jersey attributed just such a significance to Justice White's postscript, and, as a consequence, read Justice White's two strictures into the New Jersey Educational Facilities Authority Law. Clayton v. Kervick, 59 N.J. at 600, 285 A.2d at 20-21. The New Jersey Court held explicitly that no college may participate in the program if it restricts entry on racial or religious grounds or requires all students to receive instruction in the tenets of a particular faith; the Court noted further that it was unable to say on the basis of existing constitutional law whether other religious precepts or practices, unrelated to the immediate use of a facility, would also disqualify a college. 59 N.J. at 601, 285 A.2d at 21.

Although the Authority has not promulgated any rules or regulations setting forth how a sectarian institution will qualify for its assistance, it considers each application on a case by case basis to determine whether the financing of a particular project will cause excessive entanglement between the State of New Jersey and religion. In making this determination, the Authority uses the tests set forth in the plurality opinion in Tilton v. Richardson, supra at 685. These tests are whether the institution forms an integral part of the religious mission of a sectarian group, whether the facilities to be financed are inherently neutral as to religion and the degree of contact required between the State and the sectarian institution. In addition, the Authority imposes the prohibitions set forth by the Supreme Court of New Jersey in the third Clayton v. Kervick opinion: no college may participate if it restricts entry on racial or religious grounds or requires all students to receive instruction in the tenets of a particular faith. Clayton v. Kervick, 59 N.J. at 601, 285 A.2d at 21.

In view of the similarities between the South Carolina and the New Jersey laws and the parallel treatment of these laws by the Court in Hunt v. McNair and Clayton v. Kervick, 403 U.S. at 945, the State of New Jersey has a clear interest in the instant appeal as amicus curiae.

Argument

THE ESTABLISHMENT CLAUSE PERMITS STATES TO PROVIDE FINANCING SERVICES FOR THE CONSTRUCTION OF FACILITIES AT RELIGIOUSLY AFFILIATED INSTITUTIONS OF HIGHER EDUCATION.

Initially, this appeal requires the Court to determine whether the restrictions imposed by the First Amendment on financial assistance to religiously affiliated educational institutions apply at all to loans by an independent state authority which operates on a self-sustaining basis by the issuance of revenue bonds. Compare Lemon v. Kurtzman, 403 U.S. 602 (1971) and Tilton v. Richardson, 403 U.S. 672 (1971) with Walz v. Tax Com'n, 397 U.S. 664 (1970).

The educational facilities authority acts of South Carolina and New Jersey may be likened to many other acts providing governmental services of benefit to certain "consumers." It has never been suggested that a state is required or even allowed to withhold from religious groups such general services as police or fire protection. Walz v. Tax Com'n, supra at 671. Surely a government which sells water or electricity to the secular consumer may do business with a religiously affiliated consumer upon the same basis. Id. Nor must employees of religiously affiliated institutions be excluded from social security or a workmen's compensation program. This is true even though the government may confer a benefit under the programs which a

private entrepreneur offering the same programs would not or could not provide. These same principles dictate that a state program to finance higher education facilities may be made available to all "consumers," secular or sectarian.

As the Supreme Court of New Jersey wrote in the second of its three decisions concerning the New Jersey Educational Facilities Law:

> "Here we are dealing essentially with a banking operation conducted by an agency of the State. If the operation were as extensive as a general banking business, it could hardly be urged the establishment clause would bar every sectarian borrower. We see no difference in principle because the State has embarked upon a banking venture in a limited area in which, in words of section 1, 'financial resources are lacking' for the construction of 'required dormitory and other educational facilities at public and private institutions of higher education.' Again, this is not to deny that the sectarian institution will derive a 'benefit' from the governmental service. Obviously there is a benefit in obtaining something not provided by regular commercial sources, or in obtaining it at a lower rate of interest. Here, as in other areas of commercial activity a State may enter, the State has credit and tax advantages which reduce the cost of money to it, and, further, since the State has no stockholders, it may offer its service without a profit. The consumer

thereby may enjoy a dollar benefit. But, the fact remains that the State furthers a public purpose and the benefit to sectarian interests is as incidental as in the sale of municipally supplied water or electricity." Clayton v. Kervick, 56 N.J. 523, 530-31, 267 A.2d 503, 506-07 (1970).

The Supreme Court of New Jersey noted further that to deny to a sectarian institution a financing service it offers to otherwise similarly situated institutions would at least invite the claim that religion is thereby inhibited. 56 N.J. at 530, 267 A.2d at 506. It is respectfully submitted, in accordance with this rationale, that the Establishment Clause permits the program under consideration just as it permits the government provision of any other service on a self-sustaining basis to all consumers.

Assuming arguendo, however, that the same general principles which govern the conformity with the First Amendment of direct financial assistance to educational institutions also apply to such a financing service, there still can be no doubt as to its validity. The critical test with respect to direct financial assistance, as explained in Lemon v. Kurtzman, supra at 613, is whether it "fosters an excessive government entanglement with religion." An initial premise must be that some contact between church and state is not only permissible, but necessary. Lemon v. Kurtzman, supra at 614. The question is how much. Certainly the very act of deciding

whether a particular use of a facility is sectarian is not excessively entangling. To hold otherwise would be to prohibit all enforcement of the church-state provision, including that contemplated in Tilton v. Richardson, supra. It may be noted too that this Court's decision in Walz v. Tax Comm'n, supra, contemplated that the government may determine whether church-owned property is used for church purposes within the meaning of a property tax exemption statute which is equally entangling. Nor would litigation to enforce the terms of a mortgage or a lease be excessively entangling. If it were, the Establishment Clause would require rather than simply permit tax exemptions for church-owned property, as the imposition of a tax might result in a tax lien and ensuing litigation. Further, as observed by the appellees in the instant case, even a foreclosure action by the state against a church affiliated institution would simply be a creditor's action to enforce financial obligations, involving no religious entanglement. If the law were otherwise, the government would be barred from numerous kinds of financial assistance to religiously affiliated organizations, for example, for housing and hospital programs. See, e.g., The Housing and Urban Development Act of 1968, Pub. L. 90-448 (for example, at 12 U.S.C.A. §1701x). It would indeed bar the enforcement of any laws, from building codes to incorporation requirements, regarding such organizations.

The New Jersey and South Carolina educational facilities acts may, under certain circumstances,

require contacts between the government and religiously affiliated organizations with respect to charges and fees for the facilities, or other ongoing financial matters concerning the operation of the facilities, but these contacts will be minimal. As in the program approved in Tilton v. Richardson, supra, the contact will consist primarily of a one-shot financial transaction followed by inspections to insure no religious use of facilities. In the present case, there will as well be continuing contacts concerning certain limited financial arrangements. This Court has struck down programs of assistance to church related schools where the programs required entanglement in the form of "comprehensive, discriminating, and continuing state surveillance," Lemon v. Kurtzman, supra, 403 U.S. at 619, but where less church-state contact was required, as for example regarding the loan of textbooks to religiously affiliated schools, Bd. of Ed. v. Allen, 392 U.S. 236 (1968), or transportation to such schools, Everson v. Bd. of Ed., 330 U.S. 1 (1947), this Court has upheld the programs. The programs considered in Allen and Everson clearly involved extensive administrative cooperation between government and schools, yet such cooperation concerned only matters of management not directly affecting basic educational policy. It was thus permitted. Similarly, the administrative cooperation between college and state which might be required by the New Jersey or South Carolina acts, fosters no excessive entanglement.

There are a number of other considerations mentioned in Tilton which show that the validity of the Educational Facilities Authority Law rests on even firmer grounds than the direct grant provisions upheld in that case.[2] The plurality opinion of the Court noted the significant differences between the religious aspects of church related institutions of higher learning and parochial elementary and secondary schools: (a) college students are less impressionable and less susceptible to religious indoctrination, (b) college and post-graduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines, and (c) many church related colleges and universities are characterized by a high degree of academic freedom. 403 U.S. at 686. New Jersey's statute is similarly limited to institutions of higher learning, N.J.S.A. 18A: 72A-26, 30, 31, so these considerations are equally applicable here. The plurality opinion in Tilton also relied upon the nonideological character of the aid which the federal statute provides, thus distinguishing it from the salary subsidy programs invalidated in Lemon v. Kurtzman. New Jersey's statute also limits its loans to the financing of facilities that are religiously neutral. Finally, the Court in Tilton and Lemon pointed to "divisive political potential" as another relevant

2. It is noteworthy that the Higher Education Facilities Act not only authorizes federal grants to institutions of higher education for the construction of academic facilities, 20 U.S.C.A. §711, but also authorizes the Commissioner of Education to make loans to such institutions. 20 U.S.C.A. §741. Yet the plaintiffs in Tilton did not even attempt to attack the loan provisions of the Act but confined their arguments to the invalidity of the grant provisions.

factor. In this case no expenditures of taxpayers' money are involved in affording religiously affiliated colleges access to the same financing services provided public and other private institutions of higher learning. Nor is it very likely that the mechanics of such arcane financing procedures will be the subject of political controversy. See Walz v. Tax Comm'n, supra at 674-76. Finally, as in Tilton, it is pertinent that "(t)he potential for divisiveness inherent in the essentially local problems of primary and secondary schools is significantly less with respect to a college or university whose student constituency is not local but diverse and widely dispersed." 403 U.S. at 689.

In short, there is no danger of "excessive entanglement" under the New Jersey program. If the State lends money to a private college for the construction of an educational facility pursuant to N.J.S.A. 18A:72A-31, no entangling relationship between the State and private college will ensue. There is no governmental analysis of the school's curriculum, nor is there any obligation on the part of the government to monitor classes held in facilities constructed with State loans. Unlike the Rhode Island and Pennsylvania programs invalidated in Lemon v. Kurtzman, New Jersey's program does not involve an annual appropriation by the Legislature. The Authority operates on a self-sustaining basis by selling its bonds to private sources and paying the principal and interest out of revenues gained by the use of the moneys so obtained. N.J.S.A. 18A:72A-11, 30, 31. The New Jersey program is a one-time,

single purpose construction loan within the purview of the Tilton rationale; and this is true even though the statute provides that each loan "shall be premised upon an agreement between the authority and the private college as to payment, security, maturity, redemption, interest and other appropriate matters." N.J.S.A. 18A:72A-31(a). Such agreements are self-executing once made, and do not involve the day-to-day minute inspection and supervision, entangling the State in the internal affairs of the institutions, which the Court found objectionable in Lemon.

Conclusion

It is respectfully submitted for the reasons set forth in the brief for the State of South Carolina and in this brief that the decision of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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On the Brief

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HUNT *v.* McNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

No. 71-1523. Argued February 21, 1973—Decided June 25, 1973

In this action for injunctive and declaratory relief appellant challenges the South Carolina Educational Facilities Act as violative of the Establishment Clause of the First Amendment insofar as it authorizes a proposed financing transaction involving the issuance of revenue bonds benefiting a Baptist-controlled college. The Act establishes an Educational Facilities Authority to assist (through the issuance of revenue bonds) higher educational institutions in constructing and financing projects, such as buildings, facilities, and site preparation, but not including any facility for sectarian instruction or religious worship. Neither the State nor the Authority is obligated, directly or indirectly, to pay the principal of or interest on the bonds; nor is the State's taxing power pledged or implicated. All expenses of the Authority also must be paid solely from the revenues of the projects. The Authority gave preliminary approval to an application submitted by the college, only 60% of whose students are Baptists. As subsequently modified, the application requests the issuance of revenue bonds to be used for refinancing capital improvements and completing the dining hall. Under the statutory scheme the project would be conveyed to the Authority, which would lease it back to the college, with reconveyance to the college on full payment of the bonds. The lease agreement would contain a clause obligating the institution to observe the Act's restrictions on sectarian use and enabling the Authority to conduct inspections. The provision for reconveyance would restrict the project to nonsectarian use. The trial court denied appellant relief, and the State Supreme Court affirmed. After this Court had vacated the judgment and remanded the case for reconsideration in the light of *Lemon* v. *Kurtzman*, 403 U. S. 602, and other intervening deci-

earlier position. 258 S. C. 97, 187 S. E. 2d 645 (1972). We affirm.

I

We begin by setting out the general structure of the Act. The Act established an Educational Facilities Authority (the "Authority"), the purpose of which is "to assist institutions for higher education in the construction, financing and refinancing of projects . . . .", S. C. Code Ann. § 22-41.4 (Cum. Supp. 1971), primarily through the issuance of revenue bonds. Under the terms of the Act, a project may encompass buildings, facilities, site preparation and related items, but may not include

> "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." S. C. Code Ann. § 22-41.2 (b) (Cum. Supp. 1971).

Correspondingly, the Authority is accorded certain powers over the project, including the powers to determine the fees to be charged for the use of the project and to establish regulations for its use. See pp. ——-——, *infra*.

While revenue bonds to be used in connection with a project are issued by the Authority, the Act is quite explicit that the bonds shall not be obligations of the State, directly or indirectly:

> "Revenue bonds issued under the provisions of this chapter shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement

to the effect that neither the State of South Carolina nor the Authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. The issuance of revenue bonds under the provisions of this act shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment." S. C. Code Ann. § 22–41.10 (Cum. Supp. 1971).

Moreover, since all of the expenses of the Authority must be paid from the revenues of the various projects in which it participates, S. C. Code Ann. § 22–41.5 (Cum. Supp. 1971), none of the general revenues of South Carolina is used to support a project.

On January 6, 1970, the College submitted to the Authority for preliminary approval an application for the issuance of revenue bonds. Under the proposal, the Authority would issue the bonds and make the proceeds available to the College for use in connection with a portion of its campus to be designated a project (the "Project") within the meaning of the Act. In return, the College would convey the Project, without cost, to the Authority, which would then lease the property so conveyed back to the College. After repayment in full of the bonds, the Project would be reconveyed to the College. The Authority granted preliminary approval on January 16, 1970, 255 S. C., at 76; 177 S. E. 2d, at 365.

In its present form, the application requests the issuance of revenue bonds totaling $1,250,000, of which $1,050,000 would be applied to refund short term financing of capital improvements and $200,000 would be

applied to the completion of dining hall facilities.[2] The advantage of financing educational institutions through a state created authority derives from relevant provisions of federal and South Carolina state income tax laws which provide in effect that the interest on such bonds is not subject to income taxation.[3] The income tax exempt status of the interest enables the Authority, as an instrumentality of the State, to market the bonds at a significantly lower rate of interest than the educational institution would be forced to pay if it borrowed the money by conventional private financing.

Because the College's application to the Authority was a preliminary one, the details of the financing arrangement have not yet been fully worked out. But Rules and Regulations adopted by the Authority govern certain of its aspects. See Jurisdictional Statement, Ap-

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[2] As originally submitted by the College and approved by the Authority, the proposal called for the issuance of "not exceeding $3,500,000 of revenue bonds. . . ." 255 S. C., at 75; 177 S. E. 2d, at 364. As indicated by a stipulation of counsel in this Court, the College subsequently secured a bank loan in the amount of $2,500,000 and now proposes the issuance of only $1,250,000 in revenue bonds under the Act, the proceeds to be used:

"(i) to repay in full the College's Current Fund for the balance (approximately $250,000) advanced to the College's Plant Fund as aforesaid; (ii) to refund outstanding short-term loans in the amount of $800,000 whose proceeds were to pay off indebtedness incurred for *capital improvements*, and (iii) to finance the completion of the dining hall facilities at a cost of approximately $200,000." (Emphasis in original.) App., p. 49.

[3] Gross income for federal income tax purposes does not include interest on "the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing. . . ." 26 U. S. C. § 103 (a)(1). For state income tax purposes, gross income does not include interest "upon obligations of the United States or its possessions or of this State or any political subdivision thereof . . . ." S. C. Code Ann. § 65-253 (4) (Cum. Supp. 1971).

pendix C, pp. 47–51. Every lease agreement between the Authority and an institution must contain a clause

> "obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination." 258 S. C., at 101; 187 S. E. 2d, at 647.

To insure that this covenant is honored, each lease agreement must allow the Authority to conduct inspections, and any reconveyance to the College must contain a restriction against use for sectarian purposes.[4] The Rules further provide that simultaneously with the execution

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[4] Rule 4 relating to the Lease Agreement provides in part that: "If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination." 258 S. C., at 101–102; 187 S. E. 2d, at 647–648.

The Rule goes on to allow the institution to remove this option in the case of involuntary sales:

"The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure of any mortgage, or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof." 258 S. C., at 102; 187 S. E. 2d, at 648. See n. 6, *infra*.

of the lease agreement, the Authority and the trustee bank would enter into a Trust Indenture which would create, for the benefit of the bondholders, a forecloseable mortgage lien on the Project property including a mortgage on the "right, title and interest of the Authority in and to the lease agreement." Jurisdictional Statement, Appendix C, p. 50.

Our consideration of appellant's Establishment Clause claim extends only to the proposal as approved preliminarily with such additions as are contemplated by the Act, the rules, and the decisions of the courts below.

II

As we reaffirm today in *Committee for Public Education and Religious Liberty* v. *Nyquist*, *ante*, the principles which govern our consideration of challenges to statutes as violative of the Establishment Clause are three.

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . ; finally, the statute must not foster 'an excessive entanglement with religion.'" *Lemon* v. *Kurtzman*, *supra*, 403 U. S., at 612–613.

With full recognition that these are no more than helpful signposts, we consider the present statute and the proposed transaction in terms of the three "tests": purpose, effect, and entanglement.

A

The purpose of the statute is manifestly a secular one. The benefits of the Act are available to all institutions of higher education in South Carolina, whether or not having a religious affiliation. While a legislature's declaration of purpose may not always be a fair guide to its

true intent, appellant makes no suggestion that the introductory paragraph of the Act represents anything other than a good faith statement of purpose:

> "It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good, to the extent and manner provided herein." S. C. Code Ann. § 22.41 (Cum. Supp. 1971).

The College and other private institutions of higher education provide these benefits to the State.[5] As of the academic year 1969–1970, there were 1,548 students

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[5] In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), this Court commented on the importance of the role of private education in this country:

"Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience." 392 U. S., at 247.

enrolled in the College, in addition to approximately 600 night students. Of these students, 95% are residents of South Carolina who are thereby receiving a college education without financial support from the State of South Carolina.

B

To identify "primary effect," we narrow our focus from the statute as a whole to the only transaction presently before us. Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. *E. g., Bradfield* v. *Roberts*, 175 U. S. 291 (1899); *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970); *Tilton* v. *Richardson*, *supra*. Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. In *Tilton* v. *Richardson*, *supra*, the Court refused to strike down a direct federal grant to four colleges and universities in Connecticut. MR. CHIEF JUSTICE BURGER, for the plurality, concluded that despite some institutional rhetoric, none of the four colleges was pervasively sectarian, but held open that possibility for future cases:

> "Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." 403 U. S., at 682.

Appellant has introduced no evidence in the present case placing the College in such a category. It is true that the members of the College Board of Trustees are elected by the South Carolina Baptist Convention, that the approval of the Convention is required for certain financial transactions, and that the charter of the College may be amended only by the Convention. But it was likewise true of the institutions involved in *Tilton* that they were "governed by Catholic religious organizations." 403 U. S., at 686. What little there is in the record concerning the College establishes that there are no religious qualifications for faculty membership or student admission, and that only 60% of the College student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina. 255 S. C., at 85; 177 S. E. 2d, at 369. On the record in this case there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education.

Nor can we conclude that the proposed transaction will place the Authority in the position of providing aid to the religious as opposed to the secular activities of the College. The scope of the Authority's power to assist institutions of higher education extends only to "projects," and the Act specifically states that a project "shall not include" any buildings or facilities used for religious purposes. In the absence of evidence to the contrary, we must assume that all of the proposed financing and refinancing relates to buildings and facilities within a properly delimited project. It is not at all clear from the record that the portion of the campus to be conveyed by the College to the Authority and leased back is the same as that being financed, but in any event it too must be part of the Project and subject to the same prohibition against use for religious purposes. In addition, as we have indicated, every lease agreement must contain a

clause forbidding religious use and another allowing inspections to enforce the agreement.[6] For these reasons, we are satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion.[7]

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[6] Appellant also takes issue with the Authority's rule allowing a purchaser at an involuntary sale to take title free of restrictions as to religious use. See n. 4, *ante*. Appellant's reliance on *Tilton* v. *Richardson*, *supra*, in this respect is misplaced. There, the Court struck down a provision under which the church-related colleges would have unrestricted use of a federally financed project after 20 years. In the present case, by contrast, the restriction against religious use is lifted not as to the institution seeking the assistance of the Authority nor as to voluntary transferees, but only as to a purchaser at a judicial sale. Because some other religious institution bidding for the property at a judicial sale could purchase the property only by outbidding all other prospective purchasers, there is only a speculative possibility that the absence of a use limitation would ever afford aid to religion. Even in such an event, the acquiring religious institution presumably would have had to pay the then fair value of the property.

[7] The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." *Clayton* v. *Kervick*, 56 N. J. 523, 530–531, 267 A. 2d 503, 506–507 (1970). The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit." 258 S. C., at 107; 187 S. E. 2d, at 650. Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion under *Lemon* and *Tilton*, we need not decide whether, as appellee argues, Appellee's Brief, p.

C

The final question posed by this case is whether under the arrangement there would be an unconstitutional degree of entanglement between the State and the College. Appellant argues that the Authority would become involved in the operation of the College both by inspecting the project to insure that it is not being used for religious purposes and by participating in the management decisions of the College.

The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution. In finding excessive entanglement, the Court in *Lemon* relied on the "substantial religious character of these church-related" elementary schools. 403 U. S., at 616. MR. CHIEF JUSTICE BURGER'S opinion for the plurality in *Tilton* placed considerable emphasis on the fact that the federal aid there approved would be spent in a college setting:

> "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education." 403 U. S., at 687.

Although MR. JUSTICE WHITE saw no such clear distinction, he concurred in the result, stating:

> "It is enough for me that . . . the Federal Government [is] financing a separable function of over-

14, the importance of the tax exemption in the South Carolina scheme brings the present case under *Walz* v. *Tax Comm'n*, *supra*, where this Court upheld a local property tax exemption which included religious institutions.

riding importance in order to sustain the legislation here challenged." 403 U. S., at 664.

A majority of the Court in *Tilton*, then, concluded that on the facts of that case inspection as to use did not threaten excessive entanglement. As we have indicated above, there is no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton*.[8]

A closer issue under our precedents is presented by the contention that the Authority could become deeply involved in the day-to-day financial and policy decisions of the College. The Authority is empowered by the Act:

"(g) [g]enerally, to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project or any portion thereof and to contract with any person, partnership, association or corporation or other body public or private in respect thereof;

"(h) to establish rules and regulations for the use of a project or any portion thereof and to designate a participating institution for higher education as its agent to establish rules and regulations for the

[8] Although the record in this case is abbreviated and not free from ambiguity, the burden rests on appellant to show the extent to which the College is church-related, cf. *Board of Education* v. *Allen*, *supra*, 392 U. S., at 248, and he has failed to show more than a formalistic church relationship. As *Tilton* established, formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause. So far as the record here is concerned, there is no showing that the College places any special emphasis on Baptist denominational or any other sectarian type of education. As noted above, both the faculty and the student body are open to persons of any (or no) religious affiliation.

> use of a project undertaken for such participating institution for higher education. . . ." S. C. Code Ann. § 22–41.4 (Cum. Supp. 1971).

These powers are sweeping ones, and were there a realistic likelihood that they would be exercised in their full detail, the entanglement problems with the proposed transaction would not be insignificant.

As the South Carolina Supreme Court pointed out, the Act was patterned closely after the South Carolina Industrial Revenue Bond Act, 258 S. C., at 107; 187 S. E. 2d, at 651, and perhaps for this reason appears to confer unnecessarily broad power and responsibility on the Authority. The opinion of that court, however, reflects a narrow interpretation of the practical operation of these powers.

> "Counsel for plaintiff argues that the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management and administration of the College. We do not so construe the Act. . . . [T]he basic function of the Authority is to see . . . that fees are charged sufficient to meet the bond payments." 258 S. C., at 108; 187 S. E. 2d, at 651.

As we read the College's proposal, the Lease Agreement between the Authority and the College will place on the College the responsibility for making the detailed decisions regarding the government of the campus and the fees to be charged for particular services. Specifically, the proposal states that the Lease Agreement

> "will unconditionally obligate the College (a) to pay sufficient rentals to meet the principal and interest requirements as they become due on such bonds, [and] (b) to impose an adequate schedule of charges and fees in order to provide adequate reve-

nues with which to operate and maintain the said facilities and to make the rental payments . . . ." App., p. 18.

In short, under the proposed Lease Agreement, neither the Authority nor a trustee bank would be justified in taking action unless the College fails to make the prescribed rental payments or otherwise defaults in its obligations. Only if the College refused to meet rental payments or was unable to do so would the Authority or the trustee be obligated to take further action. In that event, the Authority or trustee might either foreclose on the mortgage or take a hand in the setting of rules, charges, and fees. It may be argued that only the former would be consistent with the Establishment Clause, but we do not now have that situation before us.

III

This case comes to us as an action for injunctive and declaratory relief to test the constitutionality of the Act as applied to a proposed—rather than an actual—issuance of revenue bonds. The specific provisions of the Act under which the bonds will be issued, the Rules and Regulations of the Authority, and the College's proposal—all as interpreted by the South Carolina Supreme Court—confine the scope of the assistance to the secular aspects of this liberal arts college and do not foreshadow excessive entanglement between the State and religion. Accordingly, we affirm the holding of the court below that the Act is constitutional as interpreted and applied in this case.

SUPREME COURT OF THE UNITED STATES

No. 71–1523

Richard W. Hunt, Appellant,
v.
Robert E. McNair, Governor of South Carolina, et al.

On Appeal from the Supreme Court of South Carolina.

[June 25, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The question presented in this case is whether South Carolina's assistance to the Baptist College at Charlestown under the South Carolina Educational Facilities Authority Act constitutes constitutionally impermissible aid by the State for this sectarian institution.[1] The test to which I adhere for determining such questions is whether the arrangement between the State and the Baptist College is foreclosed under the Establishment Clause of the First Amendment because among

> "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to secure governmental ends, where secular means would suffice." *Abington School District* v. *Schempp*, 374 U. S. 203, 294–295 (1963) (BRENNAN, J., concurring); *Walz* v. *Tax Commission*, 397 U. S. 664, 680–681 (1970) (BRENNAN, J., concurring); *Lemon*

[1] No one denies that the Baptist College at Charlestown is a "sectarian" institution—*i. e.*, one "in which the propogation and advancement of a particular religion are a function or purpose of the institution." *Tilton* v. *Richardson*, 403 U. S. 672, 659 (1971) (separate opinion of BRENNAN, J.).

v. *Kurtzman*, 403 U. S. 602, 643 (1971) (*Lemon I*) (separate opinion of BRENNAN, J.).

Because under that test it is clear to me that the State's proposed scheme of assistance to the Baptist College is violative of the Establishment Clause, I dissent.

The act authorizes a financing arrangement between the Authority [2] and the Baptist College at Charlestown, a South Carolina educational corporation operated by the South Carolina Baptist Convention. Under that arrangement, the College would convey a substantial portion of its campus to the Authority, and the Authority would lease back the property to the College at an agreed rental. The Authority would then issue revenue bonds of the State of South Carolina in the amount of $3,500,000.00, which bonds would be payable, principal and interest, from the rents paid by the College to the Authority under the lease. The proceeds of the sale of the bonds would be used to pay off outstanding indebtedness of the College [3] and to construct additional buildings and facilities for use in its higher education operations. Upon payment in full of the principal and interest on the bonds, the arrangement requires that the Authority reconvey title to the campus properties to the

[2] The South Carolina Educational Facilities Authority is composed of the members of the State Budget and Control Board, who are the Governor, the State Treasurer, the State Comptroller General, the Chairman of the Finance Committee of the State Senate, and the Chairman of the Ways and Means Committee of the State House of Representatives. The act states that "all the functions and powers of the Authority are hereby granted to the State Budget and Control Board as an incident of its functions in connection with the public finances of the State." S. C. Code Ann. § 22–41.3 (Cum. Supp. 1971).

[3] This outstanding indebtedness pertains to certain unspecified "capital improvements." App., p. 49. Thus, it may be that the indebtedness was incurred for improvements to facilities used for religious purposes.

College free and clear of all liens and encumbrances. The arrangement does not, however, amount merely to a mortgage on the campus property. The Authority is also empowered, *inter alia*, to determine the location and character of any project financed under the act; to construct, maintain, manage, operate, lease as lessor or lessee, and regulate the same; to enter into contracts for the management and operation of such project; to establish rules and regulations for the use of the project or any portion thereof; and to fix and revise from time to time rates, rents, fees and charges for the use of a project and for the services furnished or to be furnished by a project or any portion thereof. In other words, the College turns over to the State Authority control of substantial parts of the fiscal operation of the school—its very life's blood.

It is true that the act expressly provides that State financing will not be provided for

> "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." S. C. Code Ann. § 22–41.2 (b) (Cum. Supp. 1971).

And it is also true that the Authority, pursuant to granted rule-making power, has adopted a rule requiring that each lease agreement contain a covenant

> "obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination." Jurisdictional Statement, p. 49.

But policing by the Authority to ensure compliance with these restrictions is established by a provision required to be included in the lease agreement allowing the Authority to conduct on-site inspections of the facilities financed under the act.

Thus, it is crystal clear, I think, that this scheme involves the State in a degree of policing of the affairs of the College far exceeding that called for by the statutes struck down in *Lemon I, supra.* See also *Johnson* v. *Sanders,* 319 F. Supp. 421 (Conn. 1970), aff'd, 403 U. S. 955 (1971). Indeed, under this scheme the policing by the State can become so extensive that the State may well end up in complete control of the operation of the College, at least for the life of the bonds. The College's freedom to engage in religious activities and to offer religious instruction is necessarily circumscribed by this pervasive state involvement forced upon the College if it is not to lose its benefits under the Act. For it seems inescapable that the content of courses taught in facilities financed under the agreement must be closely monitored by the State Authority in discharge of its duty to ensure that the facilities are not being used for sectarian instruction. The Authority must also involve itself deeply in the fiscal affairs of the College, even to the point of fixing tuition rates, as part of its duty to assure sufficient revenues to meet bond and interest obligations. And should the College find itself unable to meet these obligations, its continued existence as a viable sectarian institution is almost completely in the hands of the State Authority. Thus, this agreement, with its consequent state surveillance and ongoing administrative relationships, inescapably entails mutually-damaging Church-State involvements. *Abington School District* v. *Schempp, supra,* 374 U. S., at 295 (BRENNAN, J., concurring); *Lemon I, supra,* 403 U. S., at 649 (separate opinion of BRENNAN, J.).

In support of its contrary argument, the Court adopts much of the reasoning of the plurality opinion in *Tilton* v. *Richardson*, 403 U. S. 672 (1971). I disagreed with that reasoning in *Tilton* because, as in this case, that reasoning utterly failed to explain how programs of surveillance and inspection of the kind common to both cases differ from the Pennsylvania and Rhode Island programs invalidated in *Lemon I*. What I said in *Tilton* is equally applicable to the present case:

> "I do not see any significant difference in . . . telling the sectarian university not to teach any nonsecular subjects in a certain building, and Rhode Island's telling the Catholic school teacher [in *Lemon I*] not to teach religion. The vice is the creation through subsidy of a relationship in which the government polices the teaching practices of a religious school or university." 403 U. S., at 660 (separate opinion of BRENNAN, J.).

In any event, *Tilton* is clearly not controlling here. The plurality opinion in *Tilton* was expressly based on the premise, erroneous in my view, that the Federal Higher Education Assistance Act contained no significant intrusions into the everyday affairs of sectarian educational institutions. Thus, it was said in the plurality opinion:

> "[U]nlike the direct and continuing payments under the Pennsylvania program [in *Lemon I*], and all the incidents of regulation and surveillance, the Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." 403 U. S., at 688.

But under the South Carolina scheme, "continuing financial relationships or dependencies," "annual audits," "government analysis," and "regulation and surveillance" are the core features of the arrangement. In short, the South Carolina statutory scheme as applied to this sectarian institution presents the very sort of "intimate continuing relationship or dependency between government and religiously affiliated institutions" that in the plurality's view was lacking in *Tilton*. *Ibid.*

Nor is the South Carolina arrangement between the State and this College any less offensive to the Constitution because it involves as the Court asserts, no direct financial support to the College by the State. The Establishment Clause forbids far more than payment of public funds directly to support sectarian institutions. It forbids any official involvement with religion, whatever its form, which tends to foster or discourage religious worship or belief. The cases are many in which we have struck down on establishment grounds state laws that provided, not direct financial support to religious institutions, but various other forms of assistance. *McCollum* v. *Board of Education*, 333 U. S. 203 (1948) ("release time" program); *Engel* v. *Vitale*, 370 U. S. 421 (1962) (prayer reading in public schools); *Abington School District* v. *Schempp*, 374 U. S. 203 (1963) (Bible reading in public schools). Moreover, any suggestion that the constitutionality of a statutory program to aid sectarian institutions is dependent on whether that aid can be characterized as direct or indirect is flatly refuted by the Court's decisions today in *Committee for Public Education* v. *Nyquist*, — U. S. — (1973), and *Sloan* v. *Lemon*, — U. S. — (1973). In those cases, we went behind the mere assertion that tuition reimbursement and tax exemption programs provided no direct aid to sectarian schools and concluded that the "substantive

impact" of such programs was essentially the same as a direct subsidy from the State.

The South Carolina arrangement has the identical constitutional infirmities. The State forthrightly aids the College by permitting the College to avail itself of the State's unique ability to borrow money at low interest rates, and the College, in turn, surrenders to the State a comprehensive and continuing surveillance of the educational, religious, and fiscal affairs of the College. The conclusion is compelled that this involves the State in the "essentially religious activities of religious institutions" and "employ[s] the organs of government for essentally religious purposes." I therefore dissent and would reverse the judgment of the Supreme Court of South Carolina.

END OF CASE